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by Jeffrey Rosen

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THE NEW REPUBLIC

MAY 5, 1997 • \$2.95

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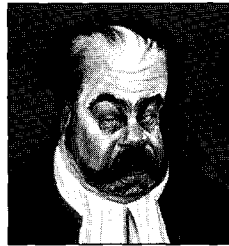
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CORRESPONDENCE

Party loyalty

To the editors:

"Spring Breakdown" (March 31) was filled with fairy-tale stories and flagrant distortions. I question Stephen Glass's news-gathering capabilities and journalistic integrity. I attended the CPAC conference and, to my knowledge, none of the fantasy tales he told occurred.

I will concede to Glass that, since he spent the majority of his time in hotel rooms and parking garages, local bars and bathrooms, the chances that he would experience something "sad or sordid" are much greater. The idea, however, that the repellent scene he paints "was only a little beyond the norm of the conference" reveals his ignorance of the events and the bright, committed conservatives surrounding him that weekend.

Unlike Glass, large numbers of these young Americans spent the weekend indulging in the scheduled events and not the "fantasy island" he described. One example of the vast student interest in the program was the standing-room-only debate between Congressman Ron Paul and a polite British gentleman on the issue of improving or abolishing the United Nations. I suspect Glass showed up late, could not see past the 100-plus young crowd, and decided to go catch a pay-per-view movie.

Am I also to suppose that Glass missed the well-attended panel of four young conservative leaders titled "Educating Tomorrow's Leaders Today"? You see, on that panel were four well-educated and well-spoken conservative leaders under the age of 27. They spoke articulately and accurately about issues facing today's college students and their parents. I guess Glass was too high from second-hand pot smoke to record that part of the weekend.

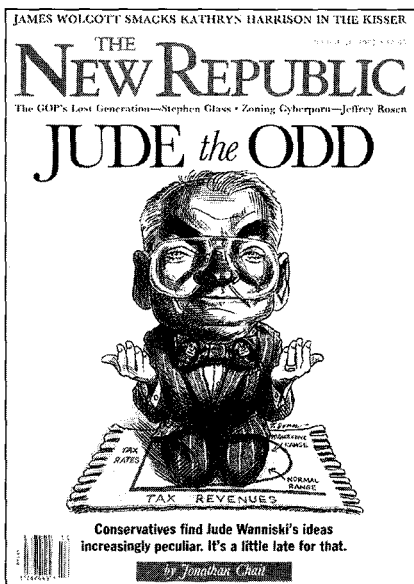
At a lunch on the conference's last day, two of the top young leaders from the conference, who were quoted in Glass's article (though he incorrectly recorded their last names), recounted the weekend's events. Not one of the lewd fairy tales Glass apparently experienced was discussed. They simply did not happen.

JOE GALLI
National Chairman,
College Republican National Committee
Washington, D.C.

To the editors:

Stephen Glass's "Spring Breakdown" is an exemplary slice-of-life portrait of Generation X, circa late '90s. While conserva-

tives might be quick to dismiss this article as a biased or mendacious voyeuristic enterprise, it would, ultimately, be unwise to do so. Frankly, an argument can be made that though Glass did a fine job of paralleling the emptiness of the CPAC participants and the apparent lack of a conservative/Republican agenda, he may not have gone far enough in discussing the implications of having a true "lost generation." What is particularly striking about Glass's article was the fact that the young people in the article did not seem to be having fun. Despite the furtive attempts at decadence, there was a jaded aspect to their drinking and drug use. Unlike their 1960s predecessors, "getting naked" seemed more an alternative to boredom rather than indicative of any



belief that there was something liberating in sexual activity.

Meanwhile, the same weekend that CPAC was taking place, 3,000 miles away, 24-year-old rapper Biggie Smalls (a.k.a. the Notorious B.I.G.) was being gunned down six months after, and apparently in retaliation for, another young rapper, Tupac Shakur, who met the same fate. All Americans, not just conservatives, have to be worried over a generation that seems to celebrate only pleasure and materialism—yet seems to enjoy neither the pursuit nor the attainment of either. The young activists may look to the lack of a visionary leader in the conservative movement as the cause of their emptiness, but the true culprit lies elsewhere: in a nihilism that reaches across race, class and gender, and that can ultimately envelop the entire body politic.

ROBERT A. GEORGE
Washington, D.C.

To the editors:

Your Stephen Glass has proven, in his "report" on this year's Conservative Political

Action Conference, to be quite a fiction writer, but not much of a reporter. In fact, the conference I attended and helped organize bore almost no resemblance whatsoever to the one he wrote about. There were no young people cavorting in the halls, fornicating in public restrooms or consuming drugs in wholesale quantities.

But maybe Glass was, in fact, somewhere else, reporting on a different gathering, which he was viewing through a fog of his own. I am led to conclude that this might be the case from the first paragraph of his story, in which he describes a brutish group of conservative young men in a hotel room, drunk and surrounded by empty "little bottles of booze" from the room's minibar, which stands open and empty as they plot to humiliate an unsuspecting female and prove to your readers that conservatives—and particularly young conservatives—are barely human.

A graphic description from a reporter who writes as if he must have been in the room with them counting the empties, but it might interest you to know that there are no minibars in any of the rooms at the Omni Shoreham. The minibar, the empties and the orgy in the public restroom, like virtually everything else in the story, were simply made up.

Unless he mistakenly wandered into another conference at another hotel and was too befuddled to know the difference.

DAVID A. KEENE
Chairman,
American Conservative Union
Alexandria, Virginia

Stephen Glass replies:

Mr. Keene's contention that my story was "fiction," "simply made up," rests upon two factoids. The first—the absence of minibars—is a quibble that hardly supports his accusation. But it's wrong anyway. While the Omni Shoreham is too old to have them installed in most rooms, mini-refrigerators are available to all guests by calling the front desk. The hotel's management says it is a common request, and housekeeping occasionally leaves the portable units in the rooms after the guest has checked out. Second, Mr. Keene says the parties didn't exist because he didn't see them. His failure to witness any of the parties stems not from their nonexistence, but because the far younger conservatives did not invite him. As for Galli, I did attend the panel of young conservatives he praises and found the attendance sparse. Perhaps he was more impressed than I was, because one of the "well-educated and well-spoken" panelists who "spoke articulately and accurately" was Galli himself.

Overzealous

To the editors:

I am surprised at the racist tone of your April 14 editorial ("Applauding Murder") in which you state, among other things, that "zealots are a permanent feature of the Palestinian polity"; that "these zealots do not have counterparts on the other side"; and that "in the political culture of Palestine random murder is a tactic sometimes clever and sometimes stupid."

Has the author forgotten the blowing up of the King David Hotel? Has he forgotten Deir Yassin? Has he forgotten the assassination of Rabin? Has he forgotten Goldstein's murder of peaceful Muslim worshipers and the cult he has become the subject of? Has he forgotten the bombing of Lebanese villages and the innocent victims: children, women and old men? Or is there a racist differentiation between Arab and Israeli victims?

All violence should be condemned without discrimination. All causes of violence such as occupation, usurpation of rights and inhuman treatment should be eliminated. Peace should be established on the basis of justice and equality. Racist comments like your editorial will not help. This is the only aspect that I wanted to tackle, leaving the rest of the misinformation contained in the editorial to any

casual follower of news or student of history who will find no difficulty in uncovering it. One final observation, though: buying land in a country does not produce sovereignty.

AHMED MAHER EL-SAYED
*Ambassador of Egypt
Washington, D.C.*

The editors reply:

In a somewhat incoherent letter, Ambassador Ahmed Maher El-Sayed does not exactly deny that "zealots are a permanent feature of the Palestinian polity." What he denies is that "these zealots do not have a counterpart on the other side." To bolster his case, he has to go back to the blowing up of the King David Hotel and the Deir Yassin enormity, both of which were perpetrated by the Irgun half a century ago. These events are the stock Arab examples of Jewish terrorism. The first of them targeted British officials who were headquartered at the hotel; in the second some 200 Arab civilians were killed during ferocious fighting over a town that could cut off Jerusalem from the rest of Jewish Palestine. These episodes were denounced by the official Zionist organizations, and, after each of them, the Jewish Agency (the proto-government of the not yet emerged State of Israel) intensified its ongoing war against the Irgun. In fact, the Haganah, the Zionist militia, actually engaged the

Irgun militarily and disarmed it. The Jewish population was also suffused with enormous and palpable shame, as it has been whenever Jews have taken innocent Arab lives. And here lie the contrasts. When Palestinian terrorists commit random murder, as happens so often, a large part of the populace is delirious with joy. Nor, for that matter, is there any visible counterbalancing popular revulsion. Indeed, according to a poll conducted by the Palestinian Center for Public Opinion, a full 49 percent of Palestinians actually support the recent café bombing in Tel Aviv. Moreover, Arafat himself uses terror as a card in his own negotiations with both Israel and the U.S. And, since he sees it as an on-again, off-again asset, he hasn't really begun to fight its perpetrators. Let's face facts: terror is an ongoing feature of politics in the Arab world. Egypt deals with this phenomenon by waging a no-questions-asked war against Islamic extremists. Less successfully, Algeria seems incapable of making progress against its zealots; within the last two weeks, nearly 150 villagers have had their throats slit by hyper-pious Muslims. Damascus still billets a whole range of secular and religious terrorist groups, but these do their work outside Syria. Sudan and Iraq simply govern by terror. Even Saudi Arabia now knows the anxiety of living with people for whom murder is just politics by other means.

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FROM WASHINGTON

Banality and evil

Louis Farrakhan is so far out of his gourd that at times he appears almost literally beside himself, but nuts is not the same as stupid. The leader of the Nation of Islam is a smart man, and he knows a good deal about the world in which he wishes to play a conspicuous part. He knows that politicians are greedy for any support they can get. He knows that journalists are easy to gull and to bully. He knows that many white people regard black people with fear and guilt, and will go to great lengths to avoid conflict with them. He knows that many white people also regard black people as their mental inferiors, and are therefore willing to be impressed by an intellectual performance from a black person that they would not find impressive from a white person. And he knows that, in an era of resegregation, most whites don't want to be around blacks, and most blacks don't want to be around whites.

Knowing all this, Farrakhan believes that the moment is arriving at which he will win recognition as the legitimate leader of black America. This would be an extraordinary achievement—Farrakhan is about as radical a figure as American politics is capable of producing—but he is right that the tenor of the times gives him reason for hope. The values of the left have been so thoroughly internalized and institutionalized in America that Farrakhan's radicalism is coming to seem quite conventional. With Malcolm X replacing Martin Luther King as the indispensable man among younger blacks, with the NAACP transforming itself from a force for integration to a force for racial Balkanization, with a black intellectual and popular culture that is overwhelmingly and openly hostile to whites, Farrakhan may convincingly pose as a figure of the mainstream. The values of the left have been adopted by whites, too, and this also helps Farrakhan. The once-radical idea of America as a sick society and American government as a corrupt oppressor is now a banality, the informing truism of Holly-

wood tripe and doctoral theses alike. The man and the times are coming together.

Farrakhan's Million Man March in October 1995 was the first officially segregated demonstration in Washington, and the first open expression of racist political power, since the Ku Klux Klan marched on the Capitol in 1925. But, by adopting the minor cover of also stressing themes of economic self-help and spiritual revival (interestingly enough, also themes prominently sounded by speakers at the KKK march), Farrakhan was able to trick a complacent press into reporting the day's events as uplifting and even encouraging racial news.

In the time since then, the minister has made further strides. He has been able to fool some Jews in search of brotherhood, such as Mike Wallace and Edgar Bronfman, into brief flirtations. More significantly, he has made some progress in attracting Republicans, who are eager for any black votes they can get and attracted by the doctrine of black self-help (not to mention the doctrine of separate but equal). Most famously, Jack Kemp, under the influence of the noted loony Jude Wanniski, spoke well of Farrakhan, but then realized the un wisdom of this and shut up. Wanniski recently found a new convert in the person of the cable television reactionary Robert Novak.

On April 14, Farrakhan won a coveted role as, of all things, a racial mediator. Mayor Edward Rendell of Philadelphia, seeking to calm the black anger that arose after a group of white men beat a black woman and two black men in the Irish-Catholic Gray's Ferry neighborhood (in the same neighborhood, shortly thereafter, blacks murdered a 16-year-old white during a robbery, but this was, predictably, deemed to be not racially motivated), invited Farrakhan to join him at a "racial unity" rally. While 500 blacks marched through Gray's Ferry, some of them yelling "white trash" at the residents, Farrakhan delivered an eighty-five-minute diatribe on the "half-slave and half-free" nation of America.

All of this is why the April 13 edition of "Meet the Press" was such an important event. In a masterful interview, Tim Russert used Farrakhan's own words, and the teachings of the Nation of Islam, to lead the minister into the territory he works so hard to avoid: the territory of his beliefs.

Farrakhan had said a few years ago that the ultimate answer to America's race problems was segregation. Did he still believe that? Why, yes: "it appears that way." Elijah Mohammed, founder of the Nation of Islam, has written that whites were created by a mad black scien-

tist named Yakub, and that whites will ultimately perish at the hands of a spaceship that will rain death upon them. Did Farrakhan believe that? "I subscribe to every word that the Honorable Elijah Mohammed taught us."

Russert quoted a Nation of Islam essay recently posted on the Internet on the subject of "the Jews' awesome control over American society and government: all presidents since Franklin Roosevelt, 1932, are controlled by Jews." Did Farrakhan believe that? "I believe that, for the small numbers of Jewish people in the United States, they exercise a tremendous amount of influence in the affairs of government."

Russert quoted Farrakhan to Farrakhan: "Who controls black art? Who controls black sports figures?

Who controls black intellectuals, black politicians? When I talk to the Jews, I'm talking to a segment of that quorum that holds my people in their grip." Farrakhan replied: "And that is true. Who controls the movement of the NAACP? The Urban League? Who controls black politicians?" The Jews, he

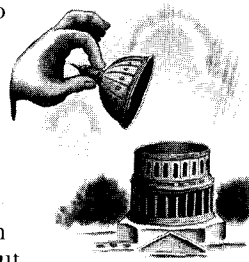
ranted on, "exercise extraordinary control, and black people will never be free in this country until they are free of that kind of control. And I do intend by the help of God to break up that control...."

The ugliest and most revealing moment of all came when Russert played a videotape of Farrakhan speaking, on March 19, 1995, on the subject of the Holocaust. "German Jews financed Hitler right here in America: Loeb and Kuhn and Jacob Schiff," Farrakhan yelled, his face contorted with hatred. "International bankers financed Hitler, and poor Jews died while big Jews were at the root of what you call the Holocaust.... Little Jews died while big Jews made money. Little Jews being turned into soap while big Jews washed themselves with it. Jews playing violin. Jews playing music while other Jews marching into the gas chambers."

When the clip was over, Farrakhan smiled a creepy smile of mock beatification. "The question is: Is it truth?" he said. "If it is truth, then it is not anti-Semitic."

It would be immoral even to deal with this. It is immoral to deal with Farrakhan at all, except to fight him. The man is a bigot and a hater. He hates whites and he hates Catholics and he hates Jews. If he were in a position to do serious harm to the people he hates, he would. As it is, he does what harm he can. And so do his willing dupes.

MICHAEL KELLY



MAY 5, 1997

JUDGMENT DAY

It's official. On April 10, a German court ruled that the leaders of Iran plotted to murder four of their Kurdish rivals at a Berlin restaurant in 1992. The finding, a tribute to the independence of Germany's judges and prosecutors, stands as a blunt rebuke to the pro-Iranian policies of German Chancellor Helmut Kohl. Only months after the Kurds were gunned down, Kohl's intelligence establishment gave the red carpet treatment to Iranian intelligence chief Ali Fallahian, the man the court has now fingered as the architect of the Berlin hit.

Unable to sustain the fiction that its "critical dialogue" with Tehran has moderated the regime, the German government has suspended relations and induced its European Union partners to do the same. The meaning of this gesture is not entirely clear, however. Europe's denunciations of Iran had a pro forma ring to them, as did the slogans of the rent-a-crowd deployed by the Islamic regime outside the German Embassy in Tehran ("death to America," and "death to Israel," but not "death to Germany"). Quietly, both sides are sending signals that they intend to resume business once this unfortunate spat is over.

But the German court's ruling, if taken seriously, vindicates America's hard line toward Iran. The U.S. policy of "dual containment" toward Iraq and Iran, which requires tough economic sanctions against both, has long been the butt of Euro-sneers. "Moralistic," our worldly allies sniff—as they subsidize investment in the lucrative Iranian market under the banner of constructive engagement. A growing number of establishment types in this country have begun to advocate a softening of U.S. policy toward Iran as well—notably Zbigniew Brzezinski, Brent Scowcroft and former Assistant Secretary of State Richard Murphy, who had the bad luck to publish this prescription in *Foreign Affairs* just after the German court delivered its verdict.

Considering that we now know that leading figures in the Iranian government actually do sit around a table and plan to rub out their enemies (among others, us), American moralism looks more and more like realism. At the very least, American toughness is an essential ingredient of any concerted Western strategy. This holds true whether the outlaw regime is headquartered

in Tehran, Baghdad, Havana, Pyongyang or—dare we say it—Beijing.

The precise mix of carrots and sticks to be applied in any particular situation is a matter over which reasonable people—and reasonable allies—can disagree. What doesn't make sense, however, is to cite the intensity of the disagreement with Europe itself as a reason to back away from our policy. Sure, disputes with traditional allies are costly and nasty. But American principle is the necessary complement to European opportunism. The tension between the two can be creative. Let the world's bad guys deal with both a European good cop and an American bad cop.

Take the case of the Helms-Burton law on Cuba. This heavy-handed instrument of pressure did indeed risk a confrontation with Europe at the fledgling World Trade Organization—a prospect viewed apocalyptically by the foreign policy punditocracy. (The Europeans, of course, could not care less about Cuba, where their investments are trivial; they opposed Helms-Burton to preclude similar U.S. measures against their much bigger stake in Iran.) But, as the emerging Helms-Burton bargain between the two sides suggests, the law gave the Clinton administration the leverage it needed to make Europe take at least some account of American property rights and Cuban human rights as Euro-business goes about making money on that island. The result is that Fidel Castro faces a much more unpredictable, and hence uncomfortable, international milieu than he did before.

So give the Clinton administration credit for its policies in the Gulf and in the Caribbean, and give the Republican Congress credit for prodding the administration into those policies. But while the Clintonites can claim to have taught the Europeans a lesson about the limits of constructive engagement in Iran and Cuba, it is a lesson they themselves have yet to apply when it comes to a much bigger fish: China. Until Washington shows itself willing to surrender some short-term economic interest in China for the sake of its professed interests in human rights and regional security, U.S. policy toward all the world's wrongdoers will remain vulnerable to European charges of opportunism and hypocrisy. •



NOTEBOOK

LAW AND DISORDER: For weeks and months and years, everyone in Washington has known that, strictly speaking, there is no Attorney General, there is merely somebody called Janet Reno sitting in the Attorney General's office. Her air of disengagement from the Department of Justice and the world is almost weird. Her only really decisive act was to destroy the bizarre innocents at Waco. (Where was disengagement when we needed it?) At Waco, at least, Reno was trying to enforce the law. Maybe that unhappy experience of law enforcement left her with a reluctance to act forcefully. In mid-April, certainly, she wimped out big time, when she decided not to appoint an independent counsel to investigate the president's fund-raising scandals. The law requires Reno to appoint an independent counsel if she finds credible evidence that the president or another official committed a crime. But she finds no credible evidence. This is more than an executive failure. It is a cognitive failure. Who with eyes to see does not see that President Clinton supervised the Democratic National Committee's fund-raising apparatus, and that this apparatus broke fund-raising laws? Reno's mumbled defense is that Clinton raised soft money for the DNC, and not direct campaign expenditures, and so he could not have broken federal election laws. But this is Clinton's transparent dodge; in fact, the millions he raised in soft money were controlled by his campaign, and benefited his campaign. In other words, the fact that the president helped to subvert the law now means he will not be investigated independently for breaking the law. If the president has any decency, he will see to it that a statue of Janet Reno stands one day in the town of Little Rock. He is spectacularly in her debt. American democracy is not.

BYRD DROPPINGS: When U.S. District Judge Thomas Penfield Jackson recently declared the line item veto unconstitutional, Madisonians breathed easier, knowing that the doctrine of division of powers had been preserved. No one, though, was more excited than West Virginia Senator Robert Byrd. "I am very pleased with the court's decision, which I believe to be a great victory for the American people and our Constitution," he cooed. Also a great victory for Byrd. The ruling salvaged Byrd's life work in the Senate: slinging pork at his hardscrabble state. As chairman of the Senate Appropriations Committee from 1988 to 1994, Byrd ensured that West Virginia received over \$1 billion in federal pork. The swine that waddled from the Appropriations Committee to Appalachia included a federal prison called the Robert C. Byrd Correctional Institution; a \$185 million FBI fingerprinting center that Byrd moved from Washington, D.C., to Clarksburg, West Virginia; and \$4.5 million to convert the Keith-Albee Theater in Huntington, West Virginia, into a four-screen multiplex. No wonder Byrd called the passage of

the line item veto "one of the darkest moments in the history of our republic." It certainly was in West Virginia.

JUST A MAN: How many have wondered in the months since last November's election, will Bob Dole serve his nation now that his days in politics are done? Some suggested Clinton appoint this ambassador from a more self-sacrificing generation to lead a commission to examine how America can rein in its entitlement addiction. But Senator Dole has chosen a different path. On April 9, he announced, to little notice, that he will join the law firm of Verner, Liipfert, Bernhard, McPherson and Hand. Bob Dole, the man who ferociously attacked Bill Clinton during the campaign for incarnating Washington sleaze, is becoming a lobbyist. And what public interests does Verner, Liipfert serve? Just two months ago, it was engaged by a coalition of tobacco companies, and its greatest coup was to persuade Congress to give broadcasters up to \$70 billion in spectrum rights for free—a boondoggle Dole denounced as "a giant corporate welfare program" during his days in office (see Paul Taylor, "Superhighway Robbery," p. 20). As a great Kansan once said: "Where is the outrage in America?"

FUND-RAISING PIETY WATCH: It's hard to stay above the fray. Just ask Dan Burton, the esteemed head of the House's campaign finance investigation, who again finds himself in the embarrassing (well, it would embarrass anyone but Burton) position of being accused of precisely the sort of corruption he was appointed to root out. As if shaking down a Pakistani lobbyist wasn't bad enough, it now seems Burton has been taking questionably illegal contributions from hard-line Sikhs with links to a now-defunct movement responsible for the death of thousands of Indian civilians. According to *The Hill* newspaper, Burton accepted donations from an arm of the International Sikh Organization, a 501 c(3) nonprofit, whose classification forbids it from political activity. Burton also took checks from a Sikh temple, even though places of worship are not permitted to make campaign contributions. Sounds familiar.

WILD PITCH: By far the oddest commemoration of the fiftieth anniversary of Major League Baseball's desegregation came on April 8 from *New York Times* editorialist Brent Staples. In a signed editorial, Staples lamented a two-year drop in the percentage of black major leaguers, from 19 to 17 percent, blaming baseball's legacy of racism. But if the share of black players fell for the past two years because of racism, why did it rise over the forty-eight years before that? And why is 17 percent evidence of discrimination, given that blacks constitute only 12 percent of the population? The smaller share of black major leaguers only suggests discrimination if you believe blacks are inherently superior athletes. Let's see Staples pitch that. •

How same-sex harassers beat the rap.

OUT OF ORDER

By Joseph Landau

When renowned conservative radio talk-show host Armstrong Williams offered Stephen Gregory a job as his personal trainer in 1994, Gregory assumed his new boss was simply interested in shaping up. But when Gregory later became a producer for the radio program, occasionally traveling to speaking engagements with Williams, Williams allegedly began showing an interest that Gregory took as more than merely professional. In a complaint filed on April 10 in D.C. Superior Court, Gregory charges that Williams climbed into his hotel bed on one occasion and refused to leave when Gregory told him to, saying, "I just want some affection." On other occasions, according to the complaint, Williams snuck up on Gregory and grabbed his buttocks or penis, or kissed him on the cheek. Gregory alleges that he avoided his boss's overtures for months, and that Williams retaliated by withholding pay, moving him to a different office and eventually firing him.

Armstrong Williams denies the allegations. He is, he says, the victim of lies, and this may turn out to be so. But even if Williams did act as Gregory alleges, he probably has little to fear from the law. A loophole in Title VII of the 1964 Civil Rights Act, which prohibits discrimination in the workplace based on race, religion, national origin and sex, makes it nearly impossible for victims of same-sex sexual harassment to seek relief. Federal judges have repeatedly thrown out such cases, claiming that men who harass men and women who harass women have different motivations than opposite-sex harassers and thus do not meet the criteria the law has set. As a result, many harassers are going unpunished at a time when hundreds of same-sex harassment cases are filling the lower courts, according to Arthur Leonard, a law professor at the New York Law School who tracks such cases.

Joseph Oncale learned about this anomaly in the law through painful experience. After quitting his job on an oil rig off Louisiana shores in 1991, Oncale accused his employer of allowing a workplace that tolerated an array of physical attacks, including one incident in which a bar of soap was forcibly inserted into Oncale's anus, another where coworkers restrained him while a supervisor placed his penis on Oncale's neck, and still another when a supervisor and coworker threatened to rape him. Denying Oncale's appeal, the Fifth Circuit Court ruled flatly that "same-sex harassment claims are not viable under Title VII."

What derailed Oncale's case and many others begins with the peculiar history of Title VII. Since Congress has never explicitly outlawed sexual harassment, the courts have tried harassment cases under statutes prohibiting sex discrimination, rather than sexual harassment itself. And since same-sex harassers are not technically discriminating based on gender, the court reasons, they are not guilty under the law. "When someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is 'because of' the victim's gender," declared the Fourth Circuit Court of Appeals. "But when the harasser and the victim are the same gender, the presumption is just the opposite because such sexually suggestive conduct is usually motivated by entirely different reasons."

To get around this, victims of same-sex harassment must prove that the defendant acted out of "sexual interest," since, as one federal judge put it, "[t]he principal way in which [sexual harassment] may be met is with proof that the harasser acted out of sexual attraction to the employee." For same-sex cases, this requires proving homosexuality, a nearly impossible burden since "proof of such homosexuality must include more than 'merely suggestive' conduct." The plaintiff, in other words, must prove that the defendant—who generally claims to be heterosexual—is actually gay.

Like Oncale, Mark McWilliams, a Virginia auto mechanic, couldn't meet these onerous burdens. McWilliams alleges in his court brief that, after he started working at the Fairfax County Equipment Management Transportation Agency, coworkers tied his hands together, blindfolded him and forced him to his knees. In his suit, McWilliams testified that in one instance "a coworker placed his finger in his mouth to simulate an oral sexual act"; on another, a coworker "placed a broomstick to McWilliams's anus while a third exposed his genitals to McWilliams." On yet another occasion, a coworker entered a bus McWilliams was repairing and fondled him.

In throwing out the case, Circuit Judge James Dickson Phillips speculated that the alleged abuse may have been due to the victim's "prudery, or shyness," or perhaps even "the perpetrators' own sexual perversion, or obsession, or insecurity . . . vulgarity and insensitivity and meanness of spirit." But on one point Phillips was certain: the harassment was not "specifically 'because of' the victim's sex."

Such fallacious reasoning opens up another ludicrous loophole in Title VII: that of the bisexual harasser. In one case, a Nevada casino whose manager was accused of sexually harassing a female employee defended itself by stating that the supervisor never actually discriminated against the plaintiff, since he had harassed members of both sexes. In short, he was an equal opportunity harasser. Amazingly, the company prevailed. (The case, *Steiner v. Showboat Operating Company*, was later overturned only when it was proven that the manager treated women worse than men. While he "may have referred to men as 'assholes,'" the court found, "he referred to women as 'dumb fucking broads' and 'fuck-

ing cunts' . . . " Hence, discrimination after all.)

As it stands, federal law is not only silent on the subject of homophobia, but actually rewards people for it. A defendant charged with same-sex harassment, for instance, could claim that he touched and taunted a man he thought was a gay employee merely to humiliate him. Attorney Hayden Coleman notes that, if jurors find the "defendants' comments are simply a degrading and insulting attempt to target plaintiffs' sexuality, they must find for the defendants."

That loophole could close up if Congress passes the Employment Non-Discrimination Act. But even this measure would not eliminate all the opportunities for evasion in Title VII. Only if Congress amended Title VII to specifically outlaw sexual harassment could courts finally find for victims of both same- and opposite-sex harassment. If not, lower courts will continue to establish contradictory precedent until the Supreme Court finally steps in.

And that is exactly what the high court may finally do. Last December, the Court asked the Justice Department for an official opinion on the actionability of Title VII, raising expectations that the Court will take up the appeal in *Oncale*. But that case will only address the broad question of whether same-sex harassment charges can ever be brought under Title VII, not the more precise question of what actually constitutes same-sex harassment.

Meanwhile, Stephen Gregory's lawyer hopes to get around the current loopholes by filing his complaint in the District of Columbia's court system, which, like nine states, bars both gender and sexual-orientation discrimination. That should give him at least the chance of a fair hearing. Others won't be so lucky.

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The religious right's new target.

BALANCED BOOKS

By Catherine Elton

In the family room of a modest middle-class home on a cul-de-sac in Springfield, Virginia, four lively, middle-aged women are busily stuffing envelopes with bold-colored brochures and bumper stickers. It is a pleasant, cozy room, decorated in earth tones that have faded from the sun that streams through the sliding glass door. Lining one wall are *Reader's Digest* abridged books and a collection of teddy bears. Above the television hangs a rendering of the Ten Commandments, done up in luminescent black and gold. The women sip

coffee and nibble homemade cinnamon rolls while they work. They are cheerful and chatty. If it weren't for the constantly ringing telephone, you could mistake the whole scene for nothing more than a block party in the planning.

But this is a more ambitious coffee klatch than that. Karen Jo Gounaud, the host, and her three friends are working for an organization called Family Friendly Libraries (FFL), which is, in its small and mostly quiet way, in the vanguard of a growing national campaign by the religious right. Gounaud founded Family Friendly Libraries over a year ago to spearhead an effort to wrest control of libraries from what she believes is the pro-gay, anti-family, radical agenda of the American Library Association (ALA), the oldest, largest association of librarians in the world. The culture wars have spread to a new front: the library.

The ALA is hugely influential. It defines, through its policies, what is and is not acceptable in a library. It has long tolerated a wide array of books, including many that at least some find offensive. Gounaud and the members of her group argue that the librarians' stance of tolerance is merely a mask for their leftist political agenda. And they believe the remedy is one that has already been successfully used by the right against liberal school boards: public campaigns to rouse that most fearsome of rabble, suburban moms.

Scabbles over what will inhabit America's library shelves are not new. Moves to purge books ranging from *Heather Has Two Mommies* to *Huckleberry Finn* have long riled civil libertarians. But, so far, these campaigns have been scattered, ad hoc insurrections usually aimed at exiling one particular book, rather than changing the way libraries are structured. Libraries, which are by nature inclusive and democratic—their use is voluntary, and they collect books from all along the ideological spectrum—have not received nearly as much organized attention from the religious right as have other institutions that shape children—schools, television and movies, and parenting itself.

In the last year and a half, though, the campaign against libraries has come into its own. In September 1995, a cover article in the Focus on the Family publication *Citizen* attacked the ALA for its policy of unrestricted library access for youth and suggested that the organization's statement of "intellectual freedom," which declares that "a person's right to use a library should not be abridged because of origin, age, background or views," is really a fancy cover for encouraging kids to read books that laud gay lifestyles, explore atheism or otherwise undermine families. The article plugged Gounaud's fledgling outfit; at about the same time, the American Family Association gave her a \$1,000 start-up donation. And, after family values activist Phil Burrell featured Gounaud in a conference, the Virginia mom took the Fairfax County FFL national, and became the right's new point woman on libraries.

It's easy to see why a media-conscious movement would put Gounaud and her organization out front. Gounaud is patient and non-confrontational. She talks in crisp soundbites about inclusion, not exclusion; mainstream, not extreme; access, not removal. FFL has never requested the removal of a book from a library, she explains. Instead, it advocates that libraries restrict children's access to books it sees as hostile to family values—books that the FFL believes advocate a radical agenda on such matters as euthanasia and homosexuality—and by including books that represent the family values perspective. "It is not about what we take out, it's about what we take in," Gounaud says. And soothing language like this has won over some of her targets. In 1993, Gounaud pushed librarians in the Fairfax County system to purchase new books representing the conservative Christian view on homosexuality: namely, that it is curable. "She pointed out a point of view that our library system didn't seem to represent," said Judith Anderson, deputy library director for the Fairfax County Public Library, adding that no one had expressed interest in these books before, and that the staff was unfamiliar with the publishing house that printed them. In the wake of the newly expressed interest, the librarians purchased \$1,100 worth of books, like *You Don't Have to Be Gay*.

Gounaud has a point when she chides the ALA for pushing a politicized agenda: the association does

take official positions on things like nuclear disarmament and the Equal Rights Amendment, positions that are identifiably liberal and that would seem to have little to do with the running of libraries.

But FFL's claims to ideological neutrality are disingenuous as well. The first article of its charter calls for a library system that "clearly acknowledges the importance and superiority of the traditional family—mother and father married to each other ... the library system will not be neutral on the subject of traditional family and family values. They will be supportive." And when libraries don't pursue family values on their own, Gounaud suggests parents take actions that some have interpreted as bibliographic civil disobedience—taking out offensive books they think should be limited to an adults-only section and repeatedly renewing them.

By asking for restrictions and not removal, Gounaud believes she and her followers can protect themselves from charges of censorship. But censorship or not, the FFL's campaign puts them on a collision course with working librarians. The ALA argues, and most librarians agree, that it is not the responsibility of librarians to restrict children's access to any part of the library collection. "The mission, goals, and objectives of libraries do not authorize librarians or governing bodies to assume, abrogate, or overrule the rights and responsibilities of parents or legal guardians," the association declared in its interpretations of the Library Bill of



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Rights. "[P]arents—and only parents—have the right ... to restrict the access of their children—and only their children—to library resources."

The history of the children's book *Daddy's Roommate* illustrates this clash of philosophies. In 1993 and 1994, *Daddy's Roommate*—which tells, in words and pictures, the story of a young boy whose parents are divorced and whose father has a male lover—was frequently challenged and was removed from library shelves across the country. But when disgruntled borrowers called FFL about the children's book, Gounaud advised them to simply request that it be relocated to the nonfiction section on homosexuality.

For its part, the ALA contends that taking a book intended for children and placing it in a section of the library intended for adults constitutes censorship. "The library is the best and most benign place for youngsters to go and seek answers to the question, 'Is what happened to me normal?'" argues Judith Krug of the ALA's Office for Intellectual Freedom. "Maturation, AIDS, masturbation, homosexuality—these are concerns young people have. To limit the ability of young people to have access to information that they need or want is not something we can condone."

In another attempt to shield children from harmful material, FFL advocates parental restrictions on young children's library cards. Under the FFL charter, "Parents ... will have full access to their minor children's reading records.... Minors will not have access to explicitly adult materials without a parent's or guardian's permission [and] libraries will also offer parents other options for limiting what their minor children check out when parents or guardians are not present." Says Gounaud, "We can't expect the library to change the culture, but they should help protect the children from the parts of the culture that are harmful to them."

Sounds reasonable, but this may actually be against the law. According to an August 1996 article in the ALA's *American Libraries*, "Laws in 47 states extend the protection of user confidentiality to library users. That elected officials have recognized the importance of privacy evidences that ALA is not alone in its regard for user rights." But that may change. FFL's next project, according to Gounaud, is to lobby state legislatures to pass laws granting parents access to their children's borrowing records or making it illegal for librarians to lend harmful material to minors.

Already, FFL boasts some victories. In Maryland, Montgomery County has instituted library cards that provide for parental access to children's borrowing records. Michigan recently passed a law that will in effect give parents the right to access their children's borrowing records. In Loudoun County, Virginia, the library board has thrown out the ALA Bill of Rights and adopted its own rules and regulations. Board Member Dennis Pierce says he'd had enough of the ALA's "radical homosexual agenda that is disparaging of the traditional family." And this may be

just the beginning: Gounaud plans to encourage FFL acolytes to run for library board seats.

The ALA, fighting back, has a "massive training program" to educate librarians and library users about intellectual freedoms and First Amendment law. In the *American Libraries* article, the ALA says that "[e]very library director should read the FFL charter and communicate to his or her staff and trustees why existing policies serve the entire community much better than the FFL proposals ever could." Liberal groups such as People for the American Way are jumping in to oppose the FFL—thus rounding out that familiar cast of characters who make their careers out of the culture wars.

Are the ALA and its allies overreacting? Perhaps not. Gounaud says she does not insist that libraries carry only "pro-family" books, just that they stock as many of them as they do "anti-family" books. But these terms are subjective and amorphous, and their application is subversive to the idea of a library. Gounaud's crusade argues, ultimately, for a criteria rooted not in intellectual and literary standards, but in political and personal passions.

And just how subjective does determining levels of family friendliness get? I recently faxed Gounaud a page from a currently available children's book of rhymes. The page showed a drawing of two nightshirted men in bed looking out the window. The rhyme began: "Robin and Richard were two pretty men, / They lay in bed till the clock struck ten." The rest of the rhyme detailed Robin and Richard's plans to get the day going. "That's outside the norm for a child's book," Gounaud said without hesitation. "That is *definitely* the kind of book that we would ask to be moved." From what piece of gay agitprop did this rhyme and picture come? None other than that 1916 classic, *The Original Mother Goose*. •

ON THE HILL

LEFT HOOK

By David Grann

Another predictable, orchestrated partisan attack on a Democratic White House: a California congressman appears on CNN claiming that "the president should get his ethical problems behind him, too, before he lectures the Congress." Another California lawmaker runs an op-ed in *The New York Times* calling for an independent counsel to investigate the Clinton money trail. On the Sunday talk shows and in the newspapers, senators excoriate the administration's sleazy solicitations: one tells *The Washington*

Post, "I'm not going to be in the business of defending the undefendable."

Only one thing was odd: the snipes all came from Democrats. And not just Democrats, liberal Democrats, the same liberal Democrats whom the president snubbed when he hewed to the center last year, and whom he now desperately needs to defend him in his latest hour of scandal. "We're like the school bully," laments one White House aide, "who just got ditched."

Ditched, dissed and dumped. There is New York Congressman Maurice Hinchey on the welfare bill: "Clintonism is the death by 1,000 cuts"; Massachusetts Representative Barney Frank on the president's latest fiscal blueprint: "Clinton's budget will be better than the Republicans', [but] it's still going to stink"; and New York Senator Daniel Patrick Moynihan, in an interview with *The New York Post*, on the president's distinguished White House guests: "Everyone has Chinese arms merchants to lunch—don't you?" Privately, Democratic members are even more cruel. "His word means nothing," says one. The line from liberal staffers is simply scathing: "He sucks"; "He lies"; "He cheats."

Even conservative Democrats, Clinton's natural base, can barely conceal their contempt. After the White House released its budget, Texas Representative Charles Stenholm shot off a press release, advising the president that "it's never too late for confession and redemption." Republicans, eager for a diversion from their own infighting, are quietly pleased. "There is stronger criticism coming from Democrats, frankly, than coming from Republicans," gloats Indiana Representative David McIntosh.

The president is discovering the unintended consequences of triangulation: a Democratic revolt in the middle of a Republican probe. Whereas the president once dismissed liberal squawking as evidence that his Morris-inspired strategy was working, he now finds himself striving to placate his progressive enemies—many of whom sit on the House and Senate committees investi-

gating alleged fund-raising improprieties, and many of whom he needs for a balanced budget agreement.

As a result, the man who banned gay marriages and neutered New Deal programs is now moving, at least modestly, to the left. After protests from Minority Leader Richard Gephardt and Minority Whip David Bonior, for instance, Clinton backed away from a Consumer Price Index adjustment. After further protests from lefty protectionists and reported concerns from the Gephardt-threatened Al Gore, aides say he has tempered his push for expanding the North American Free Trade Agreement. And, after a further flurry of complaints from

dispirited liberals, the president arranged for Chief of Staff Erskine Bowles to meet with the Progressive Caucus later this month. "If he doesn't want to get clobbered during the coming hearings," says one Democratic congressman, "he can't afford to alienate us."

It may be too late. At a recent House caucus meeting, several Democrats warned against shielding Clinton from congressional inquiries the way Republicans once shielded President Nixon during Watergate. "We can't stick our necks out," one recalls saying. "He doesn't deserve it." Even California Representative Henry Waxman, the ranking Democrat on the Government Reform and Oversight Committee, which is leading the House's fund-raising investiga-

tion, has called for a special counsel. West Virginia Representative Bob Wise and Senators Moynihan and Wisconsin's Russ Feingold have made similar demands.

Of course, Democrats have pushed hard to expand the fund-raising probes to include Republican misdeeds as well. "I don't think anyone is ready to eat their own," says California Representative Xavier Becerra. But, at best, congressional Democrats have remained conspicuously silent. Ever triangulating, the president infuriated Democrats again last week when he informed them, via *The New York Times*, that he was planning \$18 billion in additional Medicare savings.

And so, beset by revelations of scandal and with little room for policy maneuvering, Clinton is trying to re-



DRAWING BY VINT LAWRENCE FOR THE NEW REPUBLIC

establish his position with Democrats on the Hill? The same way he got into trouble in the first place: fund-raising. With no election in sight and subpoenas circulating through the White House, the president is crisscrossing the country, raising millions for congressional Democrats. On February 18, he flew to New York to attend a \$10,000-a-plate gathering for the Democratic Senatorial Campaign Committee, which raked in over \$1 million. Later this month, he will toast contributors to House candidates at a \$5,000-a-head affair at the New York Botanical Gardens. And he has already promised to do several more events for the Democratic Congressional Campaign Committee this spring and summer. In recent weeks, Clinton has taken to calling defecting Democrats in the middle of the night, reminding them, according to one source, of all the money he is netting for them.

All this from a man who told Hill lawmakers only a year ago that it wasn't his job to re-elect them. "Is he trying to buy us?" asks one Democratic congressman. "I don't know." Then, with only a hint of humor, he adds: "If he is, he better up the ante." •

MINSK DISPATCH

BACK TO THE U.S.S.R.

By Anna Husarska

One of the great symbols of the old ways of the Soviet Union is a simple device called *radio-tochka*, literally, radio-point. A *radio-tochka* consists of a receiver-loudspeaker and a plug in the wall. Since it receives only one frequency, it has no need for a dial, only an off-on switch. There used to be a *radio-tochka* in every humble home in the Soviet Union, piping in the one and only truth from Moscow across eleven time zones. These days, the New Russians get their news from multiband radios, satellite TV and the Internet, and they have mostly forgotten the broadcasts of *radio-tochka*. But not in Belarus. Here in Belarus, *radio-tochka* is the gospel. From 7 a.m. to 1 a.m. every day, it broadcasts, in a steady, rather soothing drip-drip-drip, material produced by the authorities—I hesitate to call it "news"—mostly fulsome reports on whomever has most recently applauded President Alexander Rogoravich Lukashenko.

Don't write off Karl Marx yet. The specter of communism is still haunting at least one small part of Europe. Throughout the former Soviet bloc, back-to-Europeans and free-marketeers are moving forward, but here, among the 10 million citizens of Belarus (maiden name

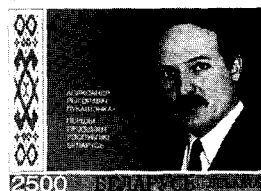
Byelorussian Soviet Socialist Republic), where Lukashenko catapulted himself from *kolkhoz* (collective farm) boss to anti-corruption crusader to, three years ago, the Belarusian presidency, nostalgia for Bolshevism prevails.

Lukashenko began in office as a nominal democrat. Charismatic and possessed of gut-level populist instincts, he swept Belarus's first free and democratic elections, in July 1994, with 80 percent of the vote. But a democrat he is not. Less than a year after assuming power, he pushed through a referendum to restore the symbols of Soviet rule to Belarus: back came the hammer-and-sickle and the red and green flag of Byelorussian SSR, which local dissidents call "sunset over morass." Last autumn, through another referendum, Lukashenko granted himself almost unlimited power, and, dropping any pretense of democratic rule, he disbanded the Parliament and fired the ministers of interior, foreign affairs and defense. About a year ago, the president began openly championing what had been assumed unthinkable: the return of Belarus to the Russian fold.

On April 2, Belarus and Russia signed a treaty of union in the Kremlin. For Moscow, the attraction lay in the prospect of Belarus as a potentially sacrificial buffer zone between Russia and an expanded NATO, which, in the form of Poland, will likely reach the Belarussian border. The accord was only a watered-down version of the full marriage Lukashenko hoped for, and it may never be consummated, because President Yeltsin, in a moment of lucidity, incorporated temporizing language withholding enactment until the accord meets with "citizens' approval."

Nevertheless, the treaty stirred fear and resentment among political dissidents in Belarus, a motley group of intelligentsia and students led by the Belarus Popular Front, and also including various species of liberals and social-democrats. The dissidents see the treaty as an invitation to Anschluss, an annexation in the wings. The result has been a series of street demonstrations that represent the first significant challenge to Lukashenko's authority. On April 2, some 5,000 people participated in a protest that was met by police counter-force. Some 300 demonstrators were injured and another 300 detained for violating a presidential decree that bars all unauthorized public activities. More than 100 were tried behind closed doors.

"Street democracy is our only hope," says Yuri Khadyka, vice president of the Belarus Popular Front, which has called for another protest on April 26, the eleventh anniversary of the Chernobyl accident. (Chernobyl is in Ukraine, but Belarus suffered 70 percent of the contamination.) Lukashenko's response to news of the April 26 march: "It would be better to hold the Chernobyl demonstration in the thirty-kilometer [contaminated] zone. You don't need to be clever to take a walk through clean, well-tended Minsk." Then, as he surveyed the spring sowing campaign at a *kolkhoz* in the village of Khidry in western Belarus, the



president suggested that young people with excessive energy should go and work on the farms. The dissidents wonder if these statements were meant as hints that political problem cases might find themselves banished to the contaminated zones or to labor camps.

The idea is not as outlandish as it sounds. Lenin's birthday, April 22, will be celebrated in Belarus by the restitution of *subbotnik*, compulsory-voluntary Saturday community work. But a cult of Lenin is soft-core compared to Lukashenko's deeper desires. "People have said to me, 'Bring back dictatorship, bring back Stalinist times,'" he warned on radio-*tochka*. And he has told the German magazine *Handelsblatt*, "Under Hitler the German order reached its apogee. This is what corresponds to our understanding of a presidential republic and the role of a president in it."

As this quote suggests, Lukashenko's real passion seems to be not for the return of a cult of either Lenin or Stalin, but for the establishment of a cult of, unsurprisingly enough, Lukashenko. His portrait is in every office, even on a postage stamp, regarding his realm with a somber mien made slightly ludicrous by the presidential hairdo, a good ten inches of thin, lank locks draped from lower left to upper right across a great expanse of gleaming cranium. Lukashenko's postal debut revived an old joke: "Why doesn't the stamp stick properly to the envelopes? Well, perhaps because people are spitting on the wrong side."

But Lukashenko is not really fit material for humor. Watching the president on state television or listening

to him on radio-*tochka* can chill any joker's wit. Asked about footage depicting police brutality against protesters, he shrugs: "The picture is made in advance." In a lengthy press conference, he waxes ominous: "I want to warn you. My helicopter will hang over your heads in the air almost every day. I will not tell anyone in advance where I am going."

The State Department recently declared that "it is now impossible to refer to what is left in Belarus as a democracy." Translated from diplospeak, this means Belarus is a full-blown dictatorship with appalling human rights violations, crackdowns on opposition, little in the way of market reforms and a muzzled media. The mistreatment of journalists—the main spoilers of radio-*tochka* land—is particularly severe. Reporters are detained during demonstrations, sometimes beaten; foreign correspondents are expelled, their work censored; satellite links are refused, accreditations withdrawn. The local independent press consists of weeklies and a single daily that must print in Lithuania. And Radio 101.2, the sole independent broadcaster in Belarussian, was closed last fall; its frequency will probably be given to *Pryamoye deystviye*, or Direct Action, a pro-president youth organization that's a cross between Hitlerjugend and Komsomol.

Why should anyone outside of Belarus care? Well, because it is unwise to pooh-pooh a man who, a few months from now, may be standing just across the border from NATO troops whether as a Russian puppet or as his own, highly unpredictable, maximum leader. •

A glut of geriatric jailbirds.

AGE OF INNOCENCE

By Alexandra Pelosi

Six minutes away from the manicured putting greens of the historic Pinehurst Resort and Country Club, William Rodman, a 65-year-old grandfather of nineteen, relaxes in his wheelchair. Last April, Rodman suffered a stroke that paralyzed his right leg and gave him a stutter he is still trying to overcome. At the moment, he sits in front of the fish tank, watching guppies and red swordtail fish dart back and forth as the other infirm residents putter around him. "I'm growing onions, cabbage, carrots, chick peas," he stutters, pondering his contribution to the 1,000-square-foot greenhouse on the campus he

calls home. Looking up, he greets Ben Sturdivant, a 68-year-old deaf man who cannot read or write. Sturdivant smiles at Rodman, then wanders off to ceramics class. "Pretty soon," Rodman continues, "I want to plant some white potatoes."

With its gardens, pool and ping-pong tables, McCain Correctional Facility resembles a retirement home. Instead, it is where 185 of North Carolina's elderly inmates are paying their debt to society, at a cost of \$37,000 per inmate per year. Transformed in 1983 from a private hospital, McCain is the model for an emerging breed of penitentiaries that function both as jails and nursing homes.

It is also a symbol of one of the most unintended

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and least sensible consequences of the prison overcrowding caused by the current fondness for stiff hard-time sentences. While many dangerous first-time offenders are being paroled early because there is no space for them, a growing corps of nonviolent, elderly offenders remain behind bars. Of the over 1.1 million inmates in federal and state prisons in January 1996, the Criminal Justice Institute's Corrections Yearbook reported there were 63,004 geriatrics. And the number of prisoners over the age of 55 is increasing at twice the rate of the prison population as a whole, which, according to the Department of Justice's Bureau of Justice Statistics, almost doubled during the last decade.

Of little apparent harm to society, but unqualified for release by the terms of their ancient sentences, the geriatric cons are creating an economic crisis for states. Nationwide, the old reprobates cost institutions an average of \$69,000 a year, more than three times the price tag for younger inmates, according to the National Criminal Justice Commission. And since inmates are not entitled to Medicare, Medicaid or Social Security, many states are being forced to siphon off funding from other state programs, such as education, to pay the medical bills of senile criminals. Richard Douglass, author of *Oldtimers: Michigan's Elderly Prisoners*, warns the country will soon face a huge fiscal crisis in caring for its growing number of graying prisoners.

Studies predict that by the year 2000 the number of geriatric inmates, at least in the state of California, will increase by 300 percent. And that doesn't begin to gauge the price tag to the taxpayer. Annually, medical care for geriatrics in California costs up to \$80,000 per inmate. Already the state's "Old Man's Dorm" had to replace its bunk beds because the older inmates couldn't make it to the upper bunks. Last year, Pennsylvania spent \$20 million to convert a state hospital into a prison geriatric ward to offer the state's more than 1,300 geriatric inmates access to health care and counseling on everything from how to handle a catheter to how to deal with the death of a fellow inmate.

As the prison population mushrooms, states increasingly distribute get-out-of-jail-free cards—as Florida did this month, when 500 rapists, killers and other convicted criminals were released for "gain time," or good behavior. Nationally, the average murderer is out in just over seven years, and violent criminals serve an average of only 42 percent of their sentences. According to the Bureau of Justice Statistics, within three years of parole, half of the nation's paroled and pardoned prisoners are caught committing new crimes.

In the time that Rodman (serving sixty-five years for possession of eight ounces of cocaine) and Sturdivant (admitted in 1980 for a burglary that no one saw him commit) have been playing bingo and going on field trips to botanical gardens, hardcore criminals like Gerald Abernathy have revolved in and out of jail. In 1981,

a jury sentenced him to forty years for rape and sodomy, but a judge cut twenty years from Abernathy's sentence to give him "hope," and he was released from prison in 1992 after only ten. In 1993, Abernathy kidnapped and killed a North Carolina woman. Then there's Bobby Earl Smith, who had previously been convicted of shooting two men and assaulting three women in North Carolina. While on probation from the State of North Carolina court system in 1982, Smith murdered a police officer, execution style.

According to the Department of Justice, from July 1, 1995 through June 30, 1996, North Carolina's incarceration rate increased by 14 percent, adding 3,853 new criminals into the prison system, even though the state only has 18,300 beds for its 30,000 inmates. So, average felons like Bobby Earl Smith serve only 18 percent of their sentences. Oldtimers like Rodman expect to die in prison. And yet no one on parole boards thinks the William Rodmans of the system are a greater threat than the Bobby Earl Smiths. "I wish I knew how parole decisions were made," says Dr. Herbert Rosefield, assistant director of health services for North Carolina's division of prisons. "When you analyze it on an individual basis, you see the flaws of the system."

Indeed, a U.S. Parole Commission report states "older releases consistently show lower recidivism rates." And, according to a Department of Justice report issued in 1984, only 2 percent of the inmates who are 55 or older when paroled return to prison. That group includes men like 69-year-old Lawrence Singleton, arrested this year on charges of fatally stabbing a prostitute in Florida. But cases like Singleton's are a rarity. More often than not, the aged harmless remain in jail while the dangerous young are released. A 70-year-old retarded man remains in a Michigan prison, for instance, while Leslie Allen Williams, a 38-year-old, three-time convicted sex offender, is paroled in Michigan due to overcrowding. Released in 1990 after serving seven years, Williams went on a raping and killing spree—admitting to at least eleven sexual assaults and the killings of three teenage girls and one woman. "The parole boards could significantly change the prison population by assessing who is a risk and who isn't," says Bill Lovett, a policy analyst for the Michigan Department of Corrections. "Crime is a young man's game. When an inmate is no longer a risk to the public regardless of his offense, we ought return him to the community. We don't have to pay to keep them until they rot."

Politicians, however, are often too scared to release even incapacitated felons. Take the case of 68-year-old Louis Thomas. On January 14, 1995, after serving thirty-one years in a Pennsylvania prison for murdering a 12-year-old girl, Thomas was granted a commutation by then-Governor Robert Casey because Thomas was ailing, and because critical evidence that could have exonerated him had been destroyed. But Casey was replaced by a tough-on-crime governor, Tom Ridge,

and Ridge lost no time in blocking Thomas's commutation order. It was the first time in Pennsylvania history a commutation order was reversed. Meanwhile, Robert "Mudman" Simon, who murdered his girlfriend in Pennsylvania because she wouldn't participate in group sex with his gang members, was paroled by the Ridge administration in 1995. He promptly killed a New Jersey police officer.

The growing number of aging convicts is also forcing states into a morally complicated and practically difficult task—nursing the men it refuses to free. The number of older prisoners has forced states to build special geriatric facilities, like McCain, designated for "low risk" senior citizens. Cellblocks are prohibited in these institutions because prisoners need wheelchair and ambulance access. In Angola, Louisiana, the state penitentiary is home to the Elderly Olympics, a series of sporting events for inmates over 55. In Illinois, inmates at Dixon Correctional Institute have round-the-clock medical care and immobile inmates can order food to be delivered from the prison commissary to their bedside by their correctional officers. Once a month there is the big bingo tournament, and once a week the senior citizens' jazz club meets. Hocking Correctional Facility in Ohio offers miniature golf, whiffle-ball and board games. "The state is doing families a favor by taking on these medical bills," says 69-year-old Clyde Mathews, a former resident at Hocking suffering from cancer, arthritis, diabetes, heart disease, hypertension, degenerative disc disease and gout. "The tax-

payers are really getting hosed."

And the costs of nursing aged convicts, like the costs of nursing any elderly person, go on and on. At McCain, it has cost the state of North Carolina close to \$200,000 since 1993 to keep William Rodman incarcerated. In the last few years he has had full open-heart bypass surgery, an angioplasty and treatment for the stroke that immobilized him. Based on Medicare cost guidelines, the price tag on these three episodes totaled \$18,809.41 (almost the amount it costs to incarcerate a young inmate). That does not include the costs of the physical therapy he requires to regain his speech and the use of his right leg. It also doesn't include the daily costs of treating his heart disease, diabetes and hypertension.

Since Rodman's family has medical insurance, releasing him to his loved ones would not leave him destitute, and it certainly would make more sense than sticking taxpayers with the exorbitant medical bills. Even though McCain is a fully functional medical facility, it spends \$6.8 million of its \$11 million annual budget on outside medical costs, for services it cannot provide on-site. Gary Crutchfield, McCain's assistant superintendent, explains that many inmates get to McCain having never had any health care services, so they arrive and they want everything. "They want dental work, their eyes fixed, X-rays and lab work for things that have been bothering them for years," he says. "Some old guys make up illnesses just because they like to ride the bus." •

Why we still battle over MFN.

GOING THROUGH THE EMOTIONS

By John B. Judis

The summer will soon be upon us, and with it, one of the capital's deeply dysfunctional rituals: the struggle over Most Favored Nation trading status for China. This event, which every year generates a huge, bruising and impassioned debate and then ends, every year, by ratifying the same stale status quo, has become America's primary way of addressing, or rather not addressing, one of its most critical foreign policy relationships.

How did we get to this point? Granting MFN to China represents the uneasy marriage of two different policies, themselves both products of broken homes. First is the idea of Most Favored Nation trading status itself. In its current form, MFN goes back to the Roosevelt

administration's attempt to scale back, but not repeal, the Smoot-Hawley Tariff of 1930, which set average tariff levels on imports at a famously high 41.6 percent. In 1934, Congress amended Smoot-Hawley to allow the United States to reach reciprocal trade agreements with other countries that would reduce or eliminate tariffs. There began the policy of granting trading partners Most Favored Nation status.

But after World War II, in the interests of European and Japanese reconstruction, we unilaterally granted our new cold war allies MFN without demanding they remove their tariffs and other trade barriers. MFN lost its original link to reciprocity. As for communist countries, the U.S. didn't trade with them much,

but, when it did, it subjected them to the old, high Smoot-Hawley Tariff.

The idea of tying MFN to non-trade considerations originated in the early 1970s. In 1974, congressional hawks tried to undermine the Nixon administration's policy of détente with the Soviet Union by preventing it from granting Moscow MFN. Congress passed the Jackson-Vanik Amendment, which required that, in order to receive MFN, a non-market country would have to permit free emigration. (That ruled out the USSR, which refused to let Jews and other persecuted minorities leave.)

In 1980, the Carter administration, eager to draw China into a united front against the Soviet Union, granted Beijing a waiver from Jackson-Vanik, thus giving it MFN. The Chinese were granted annual waivers every summer for the next eight years, without regard to their emigration policies. Congress also did not demand that China grant the U.S. reciprocal access to its market. The original meanings of both Most Favored Nation—reciprocal trading access—and of Jackson-Vanik—free emigration—had been twisted beyond all recognition.

After the June 1989 Tiananmen Square massacre, Congress sought to tie renewal of MFN to Chinese concessions on human rights and nuclear non-proliferation. The Bush administration refused, but, in 1993, the Clinton administration agreed to attach specific conditions. Rather than meet them, the Chinese threw more dissidents into jail. They also threatened American businesses and banks with the loss of lucrative government contracts if they didn't pressure the administration into changing its position. Faced with Chinese intransigence and business lobbying, the Clinton administration backed down, agreeing in May 1994 to "delink" trade and human rights. That, it seemed, was the end. Congress would repeal Jackson-Vanik and grant the Chinese permanent MFN.

But at that point, ironically, MFN's original purpose—trade reciprocity—reared its head once again. From 1980 to 1988, U.S. exports to and imports from China stayed in rough balance. But, since then, U.S. exports have risen very slowly while Chinese exports to the U.S. have boomed. According to Greg Mastel and Andrew Szamosszegi of the Economic Strategy Institute, the ratio recently grew to almost seven to one. Last year, moreover, the U.S. ran a \$39.5 billion deficit with China, second only to our trade deficit with Japan. During Clinton's first term, the U.S. bought a total of \$122 billion more from China than we sold. At the usual yardstick of 17,000 jobs for every billion dollars in trade, that figures out to about 2 million jobs.

The deficit grew primarily because China has blocked the importation of American goods. According to the Department of Commerce (no hotbed of anti-China sentiment!), tariffs against U.S. imports "ranged as high as 150 percent, while the average nominal import tariff exceeded 35 percent." Tariffs on American automobiles, for instance, ran about 100 percent.

In addition, the Commerce Department notes, China "also relies on multiple, overlapping non-tariff barriers ... these barriers include ... import licensing requirements, import quotas ... standards and certification requirements [and] ... strict controls over Chinese enterprises' trading rights."

Some economists and business lobbyists contend that the trade deficit with China doesn't matter. They argue that the U.S. is importing low-tech, labor-intensive products from China that would not have been made in the U.S. anyway. By importing them from China, American consumers benefit from low prices. But this is misleading. If the U.S. purchased these low-tech imports from Mexico, for instance, rather than from China, then we could export more in return. China's trade barriers prevent a corresponding growth in America's exports.

The composition of China's exports has also changed—due in part to requirements that foreign investors export goods back into their home countries. The preponderance of Chinese exports has been shifting from apparel and toys (some of which are produced by factories owned by the Chinese military) toward consumer electronics, transportation equipment and electrical machinery. In 1995, the single largest component of Chinese exports was electrical machinery and equipment. These imports compete directly with products made by American workers. So, in a strange throwback to the 1930s, trade reciprocity, in the form of the trade deficit, has now joined human rights and national security as a factor in the granting of MFN to China.

Faced with these political and economic challenges, the Clinton administration has vacillated. It threatened sanctions after China sold nuclear technology to Pakistan, then backed off when senior Chinese officials claimed they were unaware of the sale. The administration threatened sanctions on the mass pirating of American software, then last year struck a cosmetic deal. (According to the Software Publishers Association, 96 percent of the CDs and software programs currently sold in China are still pirated.)

With the White House continuing to accommodate China, an odd coalition of politicians and activists has formed to push for a harder line. The first step in their view is to deny China MFN. The opposition to MFN in Congress ranges from trade hawks like Minority Leader Richard Gephardt, to human rights advocates like Nancy Pelosi, to unreconstructed anti-Communists like Christopher Cox, to Republican partisans like Bill Paxon who want to dramatize the connection between the administration's fund-raising and its China policy. Behind them are a group of activists led by Christian conservative Gary Bauer and AFL-CIO official Jeff Fiedler. Fiedler, Harry Wu's principal sponsor in the U.S., is a veteran of these battles, but former Reagan official Bauer, president of the Family Research Council, is a raw recruit. Concerned about Chinese religious persecution, the former Reagan official has enlisted an impressive array of Christian organizations, including

the American Family Association and the Reverend James Dobson's Focus on the Family. (He hasn't gotten the Christian Coalition and probably for good reason: in December 1995, Christian Coalition President Pat Robertson's International Family Entertainment Inc., the Lippo Group and a Malaysian real estate concern made a deal to invest heavily in Chinese television.)

MFN opponents could force a close vote this year. "We have got a 50-50 change of winning this in the House," says Bauer. "If that happens, all bets are off. We will get conversations with the administration." But no one I talked to on Capitol Hill believes that the anti-MFN forces have enough votes to win in the Senate and, certainly, not enough to override an administration veto. Too many House and Senate members won't buck the business lobbies. And others, such as South Carolina Senator Fritz Hollings or Michigan Representative Sander Levin, simply don't believe that denying MFN is the right way to improve U.S. policy. They may be right. MFN is an exceedingly blunt instrument meant to punish China for a multitude of diverse infractions. Magic bullets usually end up missing the target.

If the U.S. could get Western Europe and Japan to join in pressuring China on trade, security and human rights, then denying MFN might have some impact. But the U.S. won't get this cooperation, and, without it, there is reason to question, based on past Chinese behavior, whether purely unilateral American action

would have beneficial results. Denying MFN might not make China's leaders more democratic and pacific, but instead could encourage a period of domestic crack-down and international provocation. Nor would it lead China to open its markets to American goods. Instead, China might well switch its purchases from Boeing to Airbus and from General Motors to Toyota.

The more sophisticated MFN opponents recognize that MFN denial works better as a threat than a reality. Says Alan Tonelson, research director of the U.S. Business and Industrial Council, "My basic take is that, in a perfect world where you had a competent U.S. China policy, I would not recommend doing this." Tonelson thinks that supporting the denial of MFN is the only way to send Clinton and the Chinese a message. He might be right. If the MFN foes can win a vote in the House this time, they will shake up Clinton and the Chinese without the U.S. suffering the consequences of actually imposing sanctions. Yet if we witness a repeat of what happened in 1994—a rousing debate followed by a solid victory for MFN—then the administration will probably stick complaisantly with its current policy.

The problem congressional critics of U.S. China policy face is perennial: Congress can't really make an alternative policy. It can only disrupt a current one, and the costs of doing that often exceed the benefits. For now and for the foreseeable future, America's China policy will rest in the hands of Madeleine Albright and William Jefferson Clinton. •

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SUPERHIGHWAY ROBBERY

By Paul Taylor

Edward O. Fritts is a Southern gentleman not given to braggadocio. So when he claims that “no one has more sway with members of Congress than the local broadcaster,” the observation bears attention. Fritts is in a position to know, and crow. As president of the National Association of Broadcasters, he’s just put the finishing touches on what some regard as the lobbying coup of the decade.

On April 3, the Federal Communications Commission awarded new space on the public airwaves to the nation’s more than 1,500 television stations, which will use the frequencies to launch the next revolution in home entertainment: digital television that promises theater-quality movies, CD-quality sound, Internet access, interactive games, paging services and a bag of goodies no one’s dreamed up yet.

To make the transition seamless for consumers, the government is loaning extra frequencies to broadcasters for at least nine years. During this transition period, the broadcasters will transmit two sets of signals— analog for today’s stupid TVs, digital for tomorrow’s smart ones. Once everyone has switched to digital sets (or, at a minimum, bought converter boxes), the broadcasters will give back the portion of the spectrum they’ve been using for analog.

At least that’s the theory. Some critics wonder whether the broadcasters will ever actually part with their old spectrum. Others pose an even more basic question. Why are the broadcasters getting this “loaner” for free? Since 1992, the government has been auctioning spectrum space, raising more than \$20 billion from wireless phone and direct-broadcast satellite companies. But this precious new spectrum space—FCC Chairman Reed Hundt calls it “beachfront property on the Cyber Sea”—went for less than a song: the broadcasters aren’t paying a penny for it. Had the space been sold, it would have fetched up to \$70 billion for the federal Treasury, according to FCC estimates.

William Safire called this freebie a “rip-off on a scale vaster than dreamed of by yesteryear’s robber barons.” In a *Columbia Journalism Review* article, Adam Thierer

of the Heritage Foundation called it “a sell-out of massive proportions to a powerful inside-the-Beltway lobby that is managing to steal a Fort Knox worth of spectrum.” *The Wall Street Journal* called it a “multibillion dollar giveaway” that was “the greatest sin” of the 1996 Telecommunications Act. Last year, Bob Dole called it “a giant corporate welfare program.” Arizona Senator John McCain called it “unconscionable.” *Washington Post* business columnist James K. Glassman called it “another welfare program for rich white guys.”

Those cries of outrage all came from conservatives, yet they barely caused a ripple in a conservative Congress. The issue never even rose to a vote in the Senate. And in the House, when Massachusetts Democrat Barney Frank introduced a digital spectrum auction amendment last summer, the only suspense was over how badly it would crash. The answer: 408 to 16. Shortly after that vote, newly installed Senate Majority Leader Trent Lott and a few other congressional mandarins wrote the FCC a letter making it clear that the new digital licenses should be awarded free of charge by this April. And so they were.

Why such generosity from a Republican Congress ostensibly dedicated to deficit reduction? Some point to personal connections. Lott and Fritts have been good friends since they attended the University of Mississippi together thirty-five years ago; the Dole-to-Lott succession in the Senate was certainly a banner day for the NAB. But that’s not the primary source of the broadcasters’ clout on Capitol Hill. More important is the sheer heft of the broadcast industry, whose big parent companies—General Electric (NBC), Disney (ABC), Westinghouse (CBS) and the News Corp. (Fox)—are this era’s masters of the universe.

Thanks to its deep pockets, the broadcasters’ lobby is one of Washington’s heavies, fielding a veritable army of blue suits and Gucci loafers. From his command post atop the NAB’s curvilinear building south of Dupont Circle, Fritts receives \$545,766 a year to oversee the trade association’s staff of 165 and annual budget of \$27 million. Between them, the NAB and a half dozen of the nation’s top broadcasting companies shelled out \$9.5 million in political contributions over the past decade. And the broadcasters spent \$10.7 million on lobbying in the first six months of 1996 alone,

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according to a recently released study by Common Cause. The roster of the lobbying firms they employ reads like a bipartisan who's who of old Washington bulls: Verner, Lipfert, Bernhard, McPherson and Hand (principals include former Senators George Mitchell, Lloyd Bentsen and, as of this spring, yes, Bob Dole); Barbour, Griffin & Rogers (principals include former RNC Chairman Haley Barbour); Black, Kelly, Scruggs & Healy (principals include former acting RNC Chairman Charles Black and former DNC Treasurer Peter Kelly); Timmons and Company, Inc.; Podesta Associates, Inc.; Wilmer, Cutler & Pickering; Wiley, Rein & Fielding; and Johnson, Smith, Dover, Kitzmiller & Stewart. By itself, G. E., the wealthiest corporation on the planet, hires nineteen separate firms to look after its interests in Washington. The News Corp.'s Rupert Murdoch recently dropped a cool million-dollar check on the California Republican Party.

It helps, too, to be able to air your own propaganda. Last year, the broadcasters ran commercials on their stations claiming, with straight faces, that a spectrum auction would mean the end of free TV. At the time, the government had just eased rules that cap how many stations any broadcast conglomerate can own. Stations were being bought and sold for record prices, and pre-tax profit margins at well-managed stations were running between 25 and 50 percent. They still are. In seeming defiance of economic gravity, broadcasters' ad rates have kept going up as competition from cable has driven their audience down. The secret? Broadcasters still collect more eyeballs than anybody else, so Budweiser and McDonald's have nowhere else to go. But you wouldn't know any of this from the broadcasters' 30-second self-help spots, which showed clips of popular shows such as "Seinfeld" and "60 Minutes" fading to black because, an announcer warned, "some people in Washington want to tax local TV broadcasters." Senator McCain called the ads "an absolutely false scare tactic."

It all adds up, but Fritts has put his finger on an even more important source of his industry's clout. It rests with the broadcasters back home. They are the figures, far from Capitol Hill, who hold the ticket to every congressman's heart—access to the six o'clock news.

"There's not a single member of Congress who thinks he gets enough credit from the media," said one Republican staffer in the Senate. "So when a group of local broadcasters comes in for the annual lobbying visit, it's a whole lot different than when a group of Taco Bell franchisers comes in. What are they going to do for you, put up a big 'thank you' sign in front of their restaurants?"

This is not the sort of currency that's openly exchanged. On the contrary, broadcasters insist in private and in public that they never barter journalistic coverage for bottom-line favors. And they may mean it. But not many politicians believe them. They're as jaundiced about the media's ethics as the media are about theirs. They live in a world where image is a fragile

commodity, where paranoia is a survival tool and where it's taken as a given that if the station manager, the news director and the anchorman think you're a heluva guy, that's a very good thing.

"We know they have enormous discretion over what goes on the air each night and what doesn't," said Barney Frank. "It's not that members of Congress fear out-and-out retribution. It's more subtle. They worry that the station might decide to just ignore the shit out of them. Now I happen to be at the stage of my career where if they never say another word about me, a blessing on their head. But, for a lot of members, it can have a chilling effect."

Perhaps there would be less of a chill if the Fairness Doctrine, which required that broadcasters air all sides of public issues, were still in force. But that was scrapped during the deregulatory enthusiasms of the Reagan era, when then-FCC Chairman Mark Fowler decreed that government should treat television like any other household appliance—"a toaster with pictures."

And perhaps there would be less of a chill if broadcast journalists had actually covered the digital spectrum issue. But they flew beneath their own radar on the story, providing Congress with a cautionary reminder of their power not to report. In the scathing article last summer in *Columbia Journalism Review*, contributing editor Neil Hickey wrote: "A somnolent press—print and particularly electronic—has failed ignominiously to report the story, either because most journalists simply don't know about it, or don't understand its importance, or think it's too complex to convey or, in the case of TV people, are loath to roil the waters and inflame the public's passions on an issue in whose outcome TV networks and stations have a huge monetary interest."

Mark Fowler had it wrong and Reed Hundt has it right: television is special. That's what the law says, at any rate. The statute that governs broadcasting is the Communications Act of 1934, adopted to regulate the fledgling radio industry. Regulation was needed, the young industry had discovered, because the number of people who wanted to transmit radio signals exceeded the available frequencies on the electromagnetic spectrum. Absent regulation, there was engineering chaos. The 1934 law struck the following arrangement: broadcasters would receive licenses free of charge for the exclusive use of an assigned frequency in a specific geographic area, but in return they had to agree to serve the "public interest, convenience and necessity." Thus, broadcasters have always been hybrids: private businesses and public trustees.

Not surprisingly, the industry has always preferred the benefits of this arrangement to the obligations. They're quick to cloak themselves in their public trustee robes whenever they need something from Congress—be it free spectrum for digital, or the "must-carry" rule that Congress adopted in 1992 (and the Supreme Court just upheld this spring), which requires cable systems to make channels available to all over-the-air broadcast stations in their coverage area.

But let the government try to impose some quantifiable public interest, and hear the broadcasters squeal. They claim it's an infringement of their First Amendment rights, or an unconstitutional "taking" of their private property. "This is really a new definition of chutzpah," marveled longtime communications policy expert Henry Geller. "The broadcasters argue against spectrum usage fees on the grounds of their public interest compact, then turn around and claim the compact is unconstitutional and unenforceable."

The Supreme Court, however, has always been firm on the constitutionality of the public interest standard. In *CBS Inc. v. FCC* in 1981, the high court held that "a licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."

One person who understands this is FCC Chairman Hundt. He says that broadcasters are given "a license to use public property, and it can be conditioned in exactly the same way that an apartment lease can be conditioned to say 'No Pets.'" Hundt sees in the possibilities created by digital television a great opportunity to update society's social compact with the industry. In particular, he wants to do what other democracies have done—require that broadcasters provide free air time to candidates during political campaigns. "Think about it," he says. "We could break the back of the political fund-raising monster."

Hundt's vision is not entirely blue sky. He has two important allies: Vice President Gore, whose father, Senator Albert Gore Sr., proposed free air time for candidates back in the 1950s; and President Clinton, who proposed in March that broadcasters who receive digital licenses should provide free air time for candidates in return. By this summer, when three vacancies are to be filled at the FCC, the hard-charging Hundt also hopes to have something he's not had before—two reliable allies on the contentious five-member commission. (It was this lack of allies on the commission that kept Hundt from blocking the giveaway of the high definition spectrum.)

If the FCC proceeds with a rule requiring free air time, the broadcasters no doubt will rush into court with their familiar claims of First Amendment and Fifth Amendment protection. That probably won't fly. But the broadcasters will also run to Congress, and there they will find support. For Congress's aversion to free time extends even beyond its affection for Fritts and its desire to make nice with the station manager. Incumbent congressmen have their own interests. Under today's campaign finance system, they enjoy, on average, nearly a three-to-one fund-raising edge over challengers. A free air time system would tend to even out the game, which is why members of the Incumbent Party from both sides of the aisle will try to bury it.

Providing free time wouldn't by itself clean up politics, but it would help make things better on several fronts. It would slow down the escalating money chase that has led

both parties into scandal: political air time is the single biggest expense in modern politics. It would make politics more competitive. And, if time were provided on the condition that candidates talk directly to the camera—as President Clinton suggested last month—it would improve the discourse of politics as well.

Requiring candidates to appear in free time spots would offer a welcome antidote to attack ads, with their faceless voices and half-true smears. Last year, at the urging of a public-interest coalition that Walter Cronkite and I put together, the networks voluntarily offered a few dozen free time slots to candidates Clinton and Dole. The spots—each lasting from one to two-and-a-half minutes—were short presentations of the candidates' positions on education, taxes, etc. Like the rest of the campaign, they weren't especially newsy. But scholars at The Annenberg Public Policy Center of the University of Pennsylvania who analyzed the discourse and a national survey of the viewers who saw the spots both agreed—these presentations were more substantive, more accurate and more useful than other political communication on television, including ads and news coverage.

And the broadcasters could afford to lose some political advertising. The industry estimates that candidates spent \$500 million in paid political spots on television in 1995 and 1996. That's a small fortune in politics, but it's small change to the industry—less than 1 percent of gross advertising revenues over that two-year period.

Still, it's not going to be easy to get from here to there. Fritts sounded the war drums at the NAB annual convention in Las Vegas in mid-April. "Clearly, a new generation of politicians has decided they can't solve the country's problems, so they have chosen broadcasters to solve the problems for them," Fritts told the convention. "There are those in Washington who would impose government-mandated speech to enhance their personal and political agendas. Fellow broadcasters, we cannot let that happen." He added that broadcasters' commitment to the public interest "should not be measured by 'big brother.'"

Broadcasters are not ogres. Many are genuinely committed to the public interest. They're surely correct when they say that they aren't the cause of the fund-raising scandals or the tawdry attack ads. The politicians do that to themselves. But even if they aren't the source of the problem, broadcasters can be the start of a solution. Giving free air time to candidates, combined with getting "soft money" out of campaigns, might restore some confidence in the political system. Yes, Eddie, that's going to mean "big brother" imposing a new public interest requirement on your industry. But, like it or not, your industry made a social compact with big brother—and through him, with the American public—sixty-three years ago. We've held up our end of the bargain—providing the airwaves that sustain you, giving you an edge over your competitors, easing you into the digital age. You need to hold up yours. •

THE HARD QUESTIONS

Heaven can wait

The members of Heaven's Gate having "shed their containers," a moment's reflection on our national obsession with, and loathing toward, cults is perhaps in order. The word derives from the Latin *cultus*, meaning care or cultivation. So there is nothing weird or sinister about the etymology of the term. Nor, as it turns out, is there necessarily something amiss in being a member of a cult. That just signifies devotion to a "person, idea, or thing," according to *Webster's New Collegiate Dictionary*. As an example, the dictionary notes "the cult of Apollo." That is reassuringly ancient and affords no grounds for fear or titillation. But modern cults do. At one point or another, I'm not sure precisely when, "cult" was assimilated to "occult," and that, by definition, is at best quirky and faddish; at worst, demonic and deadly.

Many cult experts embrace a "one size fits all" model. They would have condemned the early Christians—come to think of it, their antique analogues did—as impious people who refused to propitiate the civic gods and practiced strange group rituals like the sharing of meals and the passing of secret signs and codes. But was it really the same as Heaven's Gate? Rather than lumping all unorthodox movements together under that powerful epithet, one might follow the Gospel's insistence that one know individuals and groups by their fruits.

What is the difference between a cult such as Heaven's Gate and the one that birthed the world's most pervasive religion, between cults and other communities? In a recent address, Jean Vanier, the founder of the L'Arche community, in which "normal" human beings live with persons with profound disabilities, suggested some distinctions. Cults are usually dominated "by an all-powerful guru" and no "other authority is tolerated." Not just that. "Contact with other forms of thought or behavior" is likely to be forbidden and, if it occurs, punished. The cult offers a total meaning system with no grounds for disputation and interpretation. This already distances a cult from the great world religions—in which disputations of all sorts were generated from the very start. This doesn't mean, of course, that everything is at

every moment up for grabs. It does mean that everything isn't finally settled, save for those "I believes" without which the religion couldn't exist. You can't throw out the Incarnation and still have Christianity. You can't have Judaism without the Torah. Islam is unimaginable without the Koran. And so on. But these are complex and multi-layered texts and beliefs, open to ongoing interpretation and intermingling core beliefs with culturally specific practices. Certain forms of orthodoxy discourage too much conformity to the world, but cessation from the world on the basis of fear is not enjoined. This ambiguity and flexibility allows believers to mingle incessantly with unbelievers—in relations of citizenship, neighborliness, commerce, play.

From a cultish perspective, however, the world is Manichean; good and bad are safely divided. No Augustinian murkiness here; nothing of the notion that all have sinned and fallen short of a lofty and demanding standard. This cleavage of the world into the saved and the damned is somewhat akin to anthropologist Mary Douglas's discussion of "purity and danger." For the true believer, the danger of pollution by the sullied world is enormous; this helps explain why cults insist that all ties with family, friends and other social institutions be severed. Again, many established religions call people into vocations in which they are separated from the world in order to share a life together. But the underlying rationale is not to stave off pollution and danger so much as to foster a communal life that abides by disciplined, clearly established rules. By constitutions, if you will.

Cults are characterized not so much by a rule (as in the "Benedictine rule" published and accessible to any interested person) as by caprice and rigid control. If Bo says "peep," you'd better jump. There is no appeal to an institutional rule, no recourse to an established ritual that guides the relationship of members to one another and that can be drawn upon to counter the arbitrary command of a leader or clique. Cult life is dominated by slogans rather than a shared search for wisdom or truth. What cults provide, of course, is meaning and security and a cure for lostness and loneliness. And it is all too easy to understand how people get lost in late modernity, especially in a culture as relentless and driven as this one.

What characterizes non-cultish com-

munities? First, the opportunity for each person, at his or her own pace, to grow through a freely chosen vocation. Vanier writes: "Though the mission of the community may be greater than any one member, the integrity and vocation of each is more important than numerical increase or institutional survival." Thus, such communities allow probationary periods before anyone commits himself or herself for the long haul. Prospective members are not spied on, or hounded, and they are permitted to leave if they wish. Second, such communities are not and cannot be closed in upon themselves. Even traditional cloistered communities—depending upon whether our reference point is a stricter

past or a more moderate present—permit their brothers and sisters to stay in contact with individuals and institutions outside. They see themselves as part of a larger effort rather than as a band wholly cut off from a contaminated surround. They are open to inspiration and reproof from without as well as from within.

Members of such communities are not whole and complete unto themselves but see themselves as a part of a bigger picture, a complex mosaic. The community ideal balances firm identity and openness to new possibility. A cult, once in motion, cannot be open in any genuine sense because openness, by definition, is a threat to total control over reality.

Beyond theory, however, we can distinguish cultish and non-cultish communities empirically. Bodies piled up are pretty strong evidence. A pattern of insulation, isolation, paranoia and utter contempt for those outside is also evidence. The great world religions balance themselves between *amor mundi*—love of the world—and *contra mundum*—against or in opposition to the world. With modern cults, it seems, it is all *contra* and very little *amor*. Those persons from "outside" who had contact with members of Heaven's Gate (and it was minimal) noted that they recoiled from even the slightest physical contact and observed a strange neutered quality, a kind of sexlessness. And we now know, post mortem, that twelve of the men had themselves castrated—a practice condemned very early on in Christianity as a violation of created being. Here the contempt for the world extended even to the bodies of believers. Strange, sad fruits indeed.

JEAN BETHKE ELSHTAIN



BOOKS & The Arts

Stanley Kauffmann on Films

Young People and Others

There's a unique situation today in film—internationally. Films about young people—say, those under 30—are being made by people under 30. Many such films have been made lately in America, and they have also come from numerous European countries, from Australia, New Zealand and Taiwan. Compare that fact with, for instance, *Rebel Without a Cause* (1955) and *The Wild One* (1954), made by directors who were 44 and 47, respectively.

True, in the late 1960s we got a clutch of "youth" films, some of them by newcomers, but they were patent studio moves to cash in on the temper of the times. Most of them affected me like the sight of gray-haired people at discos. Those films were leagues—generations—apart from the youth films arriving today, some of which seem to have almost an encoded air: in some degree, they seem to depend on generational recognitions.

Chasing Amy (Miramax) is one such. This is the third film by Kevin Smith, now 26, about young men and women in New York and the New Jersey suburbs. His people here are aging—they're pushing 30—but in dress, talk, interests, ambitions, they still seem emblematic of their decade. I didn't see Smith's first two films, *Clerks* and *Mallrats*, but I understand that *Chasing Amy* is a sort of continuation; and I also understand that, though I knew what was going on all the time, and cared about it, I wasn't really getting it *all*.

His three principals are in the comic-book business, not Superman stuff but comics targeted for their generation.

Two men, played by Ben Affleck and Jason Lee, are collaborators; a young woman, Joey Lauren Adams, works on her own. Affleck meets Adams in a club, is attracted, then very soon discovers that she's a lesbian. Nonetheless he continues to be attracted, and she in time responds. No slightest suggestion is made that Affleck is "saving" Adams from lesbianism: it's sheer persistence, and it touches her.

Difficulties follow. Items from Adams's past are dug up by others and make trouble. After some rough spots, an ending arrives, hopeful but not guaranteed happy. There is no Amy in the film. Lee, in one of Affleck's bad patches, tells his friend of a mistake he once made with an Amy and how, figuratively, he has been chasing her ever since. The point is not lost on Affleck.

Smith gives his film a nice feeling of joint enterprise. It's as if some young people got together, including Smith, and decided to explore this subject while

a camera rolled. Affleck and Lee are limber—moody and high-flying—and Adams is like a human weather map as she continues to discover herself sexually.

One aspect strikes a viewer who is a bit over 30. A lot in the dialogue—and there is a lot of it—is about self and self-fulfillment in love or sex or both. This is not strange in a love-and-sex story (nor is the pungent diction); still, I couldn't help remembering that a comparable story in the 1960s would have included some reference to matters other than self-satisfaction.

But Smith makes it crackle, with various aggressive honesties and wit. Instance: Affleck and Adams have a loud scorching argument in the stands at a hockey game, then storm out. A fellow in a nearby seat who has been listening intently turns to a friend and says: "I told you these were good seats."

From England, *Hollow Reed* (Cinepix). (The title is inexplicable.) This is a problem film; at any rate it treats its subject as if it were a common problem. A boy of about 10 has parents who are divorced. His mother has custody; she adores him. She has a male live-in lover. His father lives in the same town—Bath—also with a male lover. One day Oliver, the boy, turns up at his father's place with bruises and a story about being beaten by other boys. Oliver soon has other physical mishaps. We learn that his mother's lover, though not exactly a villain, has a streak in him that makes him beat Oliver from time to time. When all is revealed and legal action is taken by the father, the problem is: Will the court award custody of the child to a father who is an admitted, practicing homosexual?

Like many synopses, the above is unjustly bare; Paula Milne's dialogue is intelligent and Angela Pope's direction is lean and swift. Pope has also drawn rounded performances from the four adults: Joely Richardson as the mother, Martin Donovan (who began with Hal

FILMS WORTH SEEING

The Designated Mourner. Wallace Shawn's extraordinary theater piece, presented by the camera. Three speakers sit at a table and, by recounting their fates, recount the political and cultural decline of an epoch. Chief among the speakers is Mike Nichols, excellent. (Reviewed 3/24/97) **Hamlet.** Kenneth Branagh's third Shakespeare film is not quite up to the first two but is nonetheless a fine achievement—generally well acted if sometimes fussily directed. (1/27/97) **Mandela.** Enough of his life to explain his reputation. A solid documentary about a man who manages to be both human and heroic. (3/31/97) **Sling Blade.** Billy Bob Thornton plays the leading role in the film he wrote and directed. Like a Southern folk song about a man who meant well in a world that was too much for him. (2/10/97) —SK

Hartley) as the father, Jason Flemyng as the wife's lover, Ian Hart as the husband's. But the chief asset, without which nothing would really register, is Sam Bould as Oliver.

Pope has worked delicately and well with the boy to get from him the compound of reticence and fear and longing and, in an odd way, regard for his mother's feelings, which keeps him from snitching on her lover. Sam Bould shows no sign of being either coached or precocious. Praise to him, certainly, but obviously Pope must share in it.

Another film of **Anna Karenina** (Warner Bros.). The sufferings of illicit love have long made it a favorite with filmmakers. By my count this is the tenth version: the first was in Czarist Russia in 1910. Garbo did it twice, first a silent picture called *Love* (1927) that had an alternative ending—Karenin died and Anna and Vronsky were married; then she did it again in 1935 with Fredric March as Vronsky and Basil Rathbone as Karenin. Of the versions I've seen, that one is my favorite, because of her and those two excellent men.

But, as anything approaching a complete rendition of the book, every film of this novel is a hopeless enterprise. The problems in adapting Austen or James or Forster diminish next to Tolstoy. This novel is long because *it has to take time*. Time has to be provided in which society can wear away at those who dare to contravene it, in which love, without disappearing, alters. Thousands of films have dealt with the passage of years, but in few of them does that passage have to be gradual, as in this book. The nearest one can come to the novel, as with Garbo's second try, is to illustrate some scenes memorably.

The best element in this latest version is the soundtrack. Sir Georg Solti conducted the St. Petersburg Philharmonic in a few Tchaikovsky pieces, which were then excerpted to fit the action, and, though the sound has been souped up a bit, Solti's romantic surge comes through. Bernard Rose, the director-adaptor, is deft with the camera, but his screenplay is a ragbag, nothing like a tragedy in which the nemesis is Time. And his casting! The French actress Sophie Marceau at first looks too young for Anna, but she soon seems so superficial that it doesn't matter. The unhappily named Sean Bean shows signs that there might be a Vronsky in him, but it never arrives. James Fox, usually a reliable actor, wants to make Karenin something more than a heavy but just makes him rubbery. Only Alfred Molina, as Levin, the character taken to be Tolstoy's vicar, comes near his role, with touches of empathy and devotion. •

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—Mary Lefkowitz, WALL STREET JOURNAL

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The achievement of Antonin Scalia, and its intellectual incoherence.

Originalist Sin

By JEFFREY ROSEN

I.

We are all originalists now. That is to say, most judges and legal scholars who want to remain within the boundaries of respectable constitutional discourse agree that the original meaning of the Constitution and its amendments has *some* degree of pertinence to the question of what the Constitution means today. Unelected judges run the risk of acting undemocratically, the argument goes, when they strike down laws passed by popularly elected legislatures; and so, to minimize the dangers of what Alexander Bickel called the "counter-majoritarian difficulty," judges should strike down laws only when they clash with principles clearly enshrined in the text of the Constitution (or its amendments) during moments of constitutional politics. By preferring the will of the people, embodied in the Constitution of 1791 or 1868, to the will of the people's venal and capricious representatives in 1997, judges can claim to be protecting popular sovereignty rather than thwarting it. Alexander Hamilton famously summarized the case for originalism in Federalist No. 78: "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."

There are familiar objections to originalism, and they are rehearsed by Jack N. Rakove in *Original Meanings*, a powerful and timely book. It seems odd for judges to claim that they are acting democratically when they thwart the will of the people in 1997 by brandishing the will of the people in 1791. Isn't it "anti-democratic," Rakove asks, to allow the dead hand of "distant (political) ancestors" to constrain the present? Rakove also points to a less familiar objection: the ratifiers of the original Constitution had little chance to clarify their understanding of the text, since the Federalist Framers, eager to avoid dissolution of the Union, forced an all-or-nothing vote, and successfully resisted anti-Federalist demands for conditional ratification or a second convention. Since the ratifiers were pre-

vented from bargaining about particular provisions, Rakove concludes, "the only understanding we can be entirely confident that the majority of the ratifiers shared was that they were indeed deciding whether the Constitution would 'form a more perfect union' than the Articles of Confederation...."

Rakove's scrupulous historical narrative ends with the eighteenth century; but originalism has not been the prevailing mode of judicial discourse for most of American constitutional history. It has come into fashion episodically, usually as a reaction against more freewheeling eras of judicial policymaking, when the courts have become politically controversial and judges are eager to take refuge in the greater objectivities of text and history. In the early nineteenth century, for example, American judges modeled themselves on English com-

*A Matter of Interpretation:
Federal Courts and the Law*
by Antonin Scalia

(Princeton University Press, 159 pp., \$19.95)

*Original Meanings: Politics and Ideas
in the Making of the Constitution*
by Jack N. Rakove
(Knopf, 420 pp., \$35)

mon law courts, making law incrementally from case to case, and deriving legal principles from legal precedents, rather than resorting to the original meaning of the Constitution as a matter of course. But then Thomas Jefferson and his followers claimed that John Marshall had abused his power by using the common law method to establish the Supreme Court as the final interpreter of the Constitution. (The complaint about "judicial activism" has a rather complicated provenance.)

To reduce the discretion of run-amok judges, Jefferson proposed the following canon of constitutional interpretation: "On every question of construction [we should] carry ourselves back to the time, when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying, what meaning may be squeezed out of

the text, or invented against it, confirm to the probable one, in which it was passed." Replying sharply to Jefferson in 1833, Marshall's disciple Joseph Story stressed in his *Commentaries on the Constitution* that judges should follow "the fair meaning of the words of the text," rather than the "'probable meaning' of persons, whom they never knew, and whose opinions, and means of information, may be no better than their own." But partly to defend the courts against anti-Federalist attacks, Story suggested that judges should restrain themselves by following fixed and objective "rules of interpretation." One of Story's nineteen rules conceded that "much ... may be gathered from contemporary history, and contemporary interpretation" of the original Constitution. But Story emphasized that "nothing but the text itself was adopted by the people."

The same political and hermeneutical drama was played out 100 years later. Late nineteenth- and early twentieth-century judges, faithfully applying the common law method, struck down economic regulations passed by progressive state legislatures, including maximum hours and minimum wage laws. Progressive critics, such as Learned Hand and Felix Frankfurter, accused the Court of enforcing arbitrary principles whose connection to the text of the Constitution was hard to discern; and when Frankfurter was appointed to the Court, he and his fellow Roosevelt nominee Hugo Black had violent debates about who was the more faithful originalist.

Now the wheel has turned once more. In the 1960s and 1970s, the Court, led by Earl Warren and Warren Burger, was attacked by citizens and scholars alike for the aggressiveness of its excursions into social policy, and for a weakness for manufacturing opinions that even its friends found constitutionally unconvincing. In the 1980s, conservative judges and scholars, led most prominently by Justice Antonin Scalia, challenged the Court to restore its democratic and intellectual legitimacy by abandoning the common law constitutionalism of the Warren era and tying itself once more to the originalist mast.

Scalia joined the Court in 1986, and it

is a little startling to reflect on how dramatically he and the movement that he personifies have transformed the terms of constitutional debate. As a justice, Scalia seems increasingly frustrated, and his dissents grow lonelier and more acerbic with the passage of time. But if Scalia's substantive views often fail to carry the day, his methodological victory is nearly complete: in famous cases and in obscure ones, liberal and conservative justices find themselves debating the intricacies of eighteenth-century history. (David Souter's debates with Scalia are a recapitulation of Hugo Black's debates with Frankfurter.) Indeed, Scalia's arguments about methods of interpretation have been so widely accepted that his liberal critics unwittingly find themselves adopting his terminology. When Scalia went to Princeton last year to deliver the Tanner Lecture, his commentators paid him an unexpected and grudging tribute by accusing him of betraying his own principles. Ronald Dworkin insisted, without taking note of the magnitude of the concession that he was making, that he, Dworkin, was the true originalist; and Laurence Tribe, with a similar absence of irony, claimed to be the true textualist. For having changed the terms in which constitutional issues are discussed, Scalia can take justifiable pride.

And yet the exchanges between Scalia and some of his critics have a musty feeling, like a battle between gladiators who don't realize that they are past their prime. For the debate about the interpretation of the Constitution has largely bypassed Scalia and his critics. When Scalia was nominated to the Court, he challenged his colleagues on the bench and in the academy to rethink constitutional law from the ground up, by emphasizing the centrality of text and history. In the intervening decade, a generation of younger scholars, liberal and conservative, have taken the challenge seriously and dedicated themselves to sophisticated historical and textual analysis that calls much of Scalia's own jurisprudence into question. Alas, neither Scalia nor his liberal discussants seem familiar with the most re-

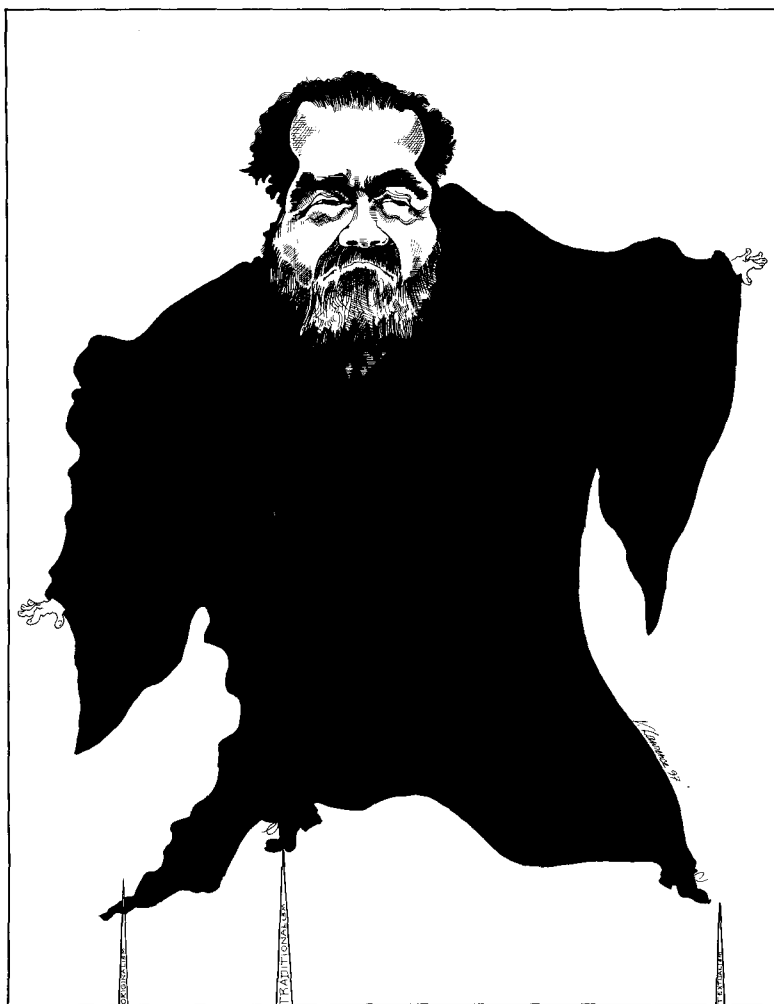
cent responses to Scalia's inconsistent application of his own methodology; and so their exchanges are sometimes too superficial to be very interesting. Ultimately, Scalia reveals himself in his new book to be not a partisan of textualism or originalism, but a partisan of traditionalism, which is a very different methodology, and looks a lot like the judge-made law that he claims to abhor. The pre-eminent exponent of originalism has transformed himself, in less than a decade, into the pre-eminent exponent of its antithesis.

nalism for a more reliable way of preserving tradition, which is traditionalism itself. In his lonely dissent in the Virginia Military Institute case, Scalia wrote: "It is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."

Scalia's allegiance to traditionalism is far deeper than his allegiance to originalism. He was born in 1936, in Trenton,

New Jersey; his father, Eugene Scalia, was an immigrant from Sicily who taught Romance languages at Brooklyn College. Antonin Scalia graduated first in his class at St. Francis Xavier, a Catholic military academy in Manhattan, where he distinguished himself as an arch-conservative. He went on to Georgetown University and to Harvard Law School in the 1950s, where he was immersed in the Legal Process School of Felix Frankfurter and Henry Hart in its heyday; its scrupulous concern for neutrality and restraint emphasized the importance of fair judicial procedures rather than the intricacies of history.

Before joining the Court, Scalia had no professional expertise as a legal historian. His academic speciality was administrative law; and he made his reputation as an advocate of broad executive power, first as Gerald Ford's assistant attorney general in charge of the Office of



ANTONIN SCALIA BY VINT LAWRENCE FOR THE NEW REPUBLIC

II.

It shouldn't be a surprise, perhaps, that Scalia has proved to be a fickle avatar of originalism and textualism. Shortly after he joined the Court, he cheerfully confessed that, for him, originalism was "the lesser evil," a means for reducing the Court's role in contested questions of social policy, rather than an end in itself. And in cases where originalism threatens to lead to inconvenient results, to expand the Court's role in upsetting longstanding moral traditions rather than to contract it, Scalia has abandoned origi-

Legal Counsel, and then as a professor at the Universities of Virginia and Chicago. On the Court, Scalia has distinguished himself more by his sparkling and vigorous prose than by a consistent devotion to one interpretive methodology or another. He has a fine polemical gift, and can puncture the pretensions of his colleagues with a sentence or a phrase. ("The Court has mistaken a Kulturkampf for a fit of spite," he wrote in *Romer v. Evans*, the gay rights case.) He is also surprisingly good at physical description: his dissent in *Planned Parenthood v. Casey*, the abortion case, ended with a vivid account of a portrait of Chief Justice Roger Taney,

hanging in the Harvard Law School library:

He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. . . . There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. . . .

Scalia has not provided a sustained account of his methodology since a series of short speeches he gave in the late 1980s. And so the Tanner Lecture seemed like an auspicious platform. Subjecting himself to scholarly scrutiny, Scalia promised to give his considered reflections about the virtues of originalism after ten years on the Court. Alas, the lecture reveals that his methodological thinking has become cruder and more simplistic with age, and that he misled scholars by promising that he viewed originalism as a means of restraining his own policy preferences. For the Tanner Lecture confirms the suspicion that, in case after case, Scalia chooses among mutually inconsistent interpretive principles—textualism, originalism, traditionalism—in order to reach results that he finds politically congenial. In this regard, he is in distinguished company. Rakove demonstrates that James Madison, too, chose cynically among different interpretive theories throughout his political career, moving from originalism to textualism, and from Framers' intent to ratifiers' intent, for reasons of "partisan advantage." But Justice Scalia is no President Madison. Abandoning the pretense of judicial neutrality, Scalia has accepted a commission as a commander in the aforementioned Kulturkampf, and his loyal foot soldiers are now heeding his call.

III.

As a literary performance, Scalia's lecture shows him in uncharacteristically good temper. His interpretive claims are modest; his responses to his commentators—Ronald Dworkin, Mary Ann Glendon, Laurence Tribe, Gordon Wood—are, by and large, measured and effective; and he writes like a dream. (The sarcasm of his recent opinions is manfully restrained.) Scalia's project is to defend the methodology that he claims to follow in statutory and constitutional interpretation—he calls it, at different times, textualism and originalism—against an alternative methodology that he calls "common law lawmaking."

Scalia begins by criticizing the idea that judicial interpretation should be

guided by the intentions of the people who draft legal texts, rather than by the language of the texts themselves. The notion that citizens should be bound by the unexpressed intentions of legislators is inconsistent, he says, with "the famous American ideal . . . a government of laws, not of men." Scalia plausibly justifies his textualism by tying it to a theory of democracy. "It is simply incompatible with democratic government," he writes, "to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated." Under the guise of rooting out unexpressed intentions, he worries, judges will be free to enact their own policy agendas, "construing law to mean not what it said but what it meant, or rather what a wise and intelligent person should have meant." He concludes that self-government cannot be reconciled with the proposition that "laws mean whatever they ought to mean, and that unselected judges decide what that is."

So he claims to be a textualist. But he also claims to be an originalist. What matters to Scalia is not what the words of the Constitution mean to us today, but what they would have meant to the people who ratified them. "The Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning." Scalia's defense of the relevance of original meaning is so widely accepted that he and Dworkin end up agreeing with each other, except that Dworkin criticizes Scalia for looking at the wrong set of original meanings, for focusing on what the lawgivers intended to do rather than what they intended to say.

Scalia responds by accepting Dworkin's distinction between what Dworkin calls "semantic" originalism, which insists that legal texts should be read to say what the lawgivers intended to say, and "expectations" originalism, which holds that texts should be understood to achieve the concrete consequences or effects that the lawgivers expected them to achieve. "It is indeed the former rather than the latter that I would follow," Scalia says, insisting that he is centrally concerned with what the text of the Constitution would reasonably have been understood to mean when it was ratified, rather than what it was intended to mean when it was drafted.

Scalia questions whether the common law method, on which most law students are weaned, is an appropriate model in constitutional cases. By asking "What is

the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?," Scalia argues, common law judges abrogate to themselves the ultimate power to make law, and thus threaten the democratic structure. By focusing instead on the original meaning of the constitutional text, and applying it to current circumstances, he argues, judges maintain their democratic legitimacy by enforcing principles ratified by the people themselves.

There is much to be said for Scalia's criticisms of the anti-democratic quality of common law constitutionalism, and for his defense of textualism and originalism. Textualism, of course, is not fundamentalism, or a belief in the ahistorical character of the secular scripture that we call the Constitution. It requires an understanding of context; and, to the extent that Scalia invites us to mine the original context of the Constitution to reveal the meaning of the text, he is suggesting nothing more controversial than that there are significant connections between text and history.

The problem is that it is not always easy to be a textualist and an originalist at the same time. Many textual provisions of the original Constitution and the Bill of Rights mean something very different to us than they did to the Americans of the nineteenth century; and if interpreted in light of their original meaning, as Scalia says they should be, they point judges toward precisely the kind of amorphous, policy-soaked, common law constitutionalism that he wants to avoid. In the 1868 edition of *Constitutional Limitations*, for example, Thomas Cooley, one of the most famous treatise writers of the nineteenth century, returns again and again to what he calls the "general principle of constitutional law": that Congress and the states can only regulate economic liberties in the public interest, and that special or privately oriented laws are unconstitutional.

Cooley finds at least a half dozen separate textual grounds for this "general principle," ranging from Article I, Section 10, which denies to the states the power to pass any law "impairing the obligation of contracts," to the Fifth Amendment, which says that private property shall not "be taken for public use without just compensation." Asking judges to decide which laws are and are not in the "public interest," however, is an inquiry that we usually associate with the common law method, not with constitutional interpretation. As Scalia reminds us, common law judges, deciding private disputes about torts and con-

tracts, are encouraged to make good law, to fashion principles of sensible social policy that will serve the public interest. To the degree that Cooley is accurately reflecting the very abstract original meaning of a series of far less abstract constitutional texts, he shows the unavoidable tension between textualism and originalism.

Originalism, in other words, sometimes leads inexorably to the common law constitutionalism that Scalia wants to avoid. By encouraging judges to decide cases in the "public interest," Scalia objects, common law constitutionalism allows judges to substitute their own conception of the public interest for that of the citizens of the United States. But Scalia neglects the inconvenient fact that the citizens of the United States, at least in the nineteenth century, endorsed a host of separate constitutional provisions that, if interpreted in light of their original meaning, seem to require judges to engage in just the sort of common law policymaking that Scalia disdains.

Scalia ignores other conflicts between constitutional text and original meaning. He complains that the due process clauses of the Fifth and Fourteenth Amendments, which say that no person shall be deprived of "life, liberty, or property, without due process of law," have been erroneously interpreted "to prevent the government from taking away certain [substantive] liberties beyond those, such as freedom of speech and of religion, that are specifically named in the Constitution." The idea that the due process clause protects substantive rights, rather than simply guaranteeing fair judicial procedure, is "my favorite example of departure from the text," Scalia argues, "and certainly the departure that has enabled judges to do more freewheeling lawmaking than any other." By its explicit terms, the due process clause "guarantees only process": property, liberty and even life can be taken, but not without "a validly enacted law and a fair trial."

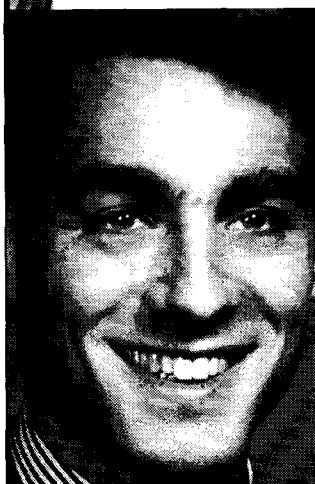
If Scalia were asking himself how an ordinary reader in 1997 would understand the words of the due process clause—"No person shall be ... deprived of life, liberty, or property, without due process of law"—he might indeed conclude that the clause guarantees only fair procedures rather than substantive liberties. But Scalia is not a New Critic, reading the text in a historical vacuum. He says he wants to be guided by "what the text would reasonably be understood to mean" when the Fifth Amendment was ratified in 1791 and the Fourteenth Amendment was

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ratified in 1868. And it is almost certain that in 1868, at least, the Fourteenth Amendment would not have been understood as Scalia understands it, as a guarantee of fair procedures alone.

Beginning in the Jacksonian era, there was a substantial overlap, in state and federal cases, between notions of due process of law and notions of equal protection of the law. The idea that laws had to serve the public interest rather than special interests, and that exclusive privileges could not be granted to one group at the expense of another, was seen as a basic requirement of due process. As a result, in the antebellum era, the state and federal due process clauses were often interpreted to strike down laws that took property or rights from one group of people (say, creditors) and transferred it to another group of people (say, debtors). Laws that benefited and affected all equally were distinguished from "class legislation" that redistributed wealth rather than serving public purposes, such as promoting health, safety, and morals.

So the text and the original meaning of the due process clause point in opposite directions; and if Scalia were seriously interested in original meanings, he might have to view the due process clause as a mandate that judges should protect certain fundamental economic rights, or privileges and immunities—such as the right to make and enforce contracts—against the redistributive impulses of populist legislatures. This, of course, is highly embarrassing to Scalia, because he has staked his judicial career not only on original understanding, but also on judicial restraint. He never tires of castigating the activist decisions at the beginning of this century, when judges invoked the amorphous words of the due process clause to strike down minimum wage and maximum hour laws. If Scalia were true to his principles, he would have to recognize that some of these activist judges were faithfully applying, rather than thwarting, the original understanding of the Fourteenth Amendment.

IV.

For a purported textualist, Scalia is remarkably uninterested in the actual text of the Constitution; and for a purported originalist, he is remarkably uninterested in eighteenth-century meanings. The text that is relevant to most of the cases that he discusses in his book is the Fourteenth Amendment to the Constitution, but at no point does Scalia quote the language that he is purporting to construe. Ratified in 1868, in

the wake of the Civil War, the amendment begins:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The original Bill of Rights had only restricted the powers of Congress rather than those of the states. Scalia is skeptical of Supreme Court decisions from the 1920s to the 1960s, which held that the Fourteenth Amendment "incorporated" the guarantees of the Bill of Rights against the states, so that today neither Congress nor the states can pass laws abridging freedom of speech, though the First Amendment says only that "Congress shall make no law." "If the text of the Fourteenth Amendment said that 'the Bill of Rights, which has hitherto been a restriction only upon the federal government, shall henceforth be a restriction also upon the states,' there might be room for an argument that the 1868 understanding of the Bill of Rights was thereby adopted, not only for the states but for the federal government as well," Scalia writes. "But it does not say that."

But it *does* say that. Writing for a unanimous Supreme Court in 1833, John Marshall observed that if the Framers of the Bill of Rights had intended to impose its restrictions on the states, they would have used language mirroring the language in Article I, Section 10 of the original Constitution, which says that "No State shall" pass ex post facto laws, bills of attainder and a host of other abuses of power. After the Civil War, John Bingham, the Ohio Republican who drafted the Fourteenth Amendment, explained that he explicitly chose the words "No State shall" to make clear the intention of Congress to force the states (as well as Congress) to respect the privileges and immunities of citizenship, which included, in his view, most of the guarantees of the original Bill of Rights.

In a decision flamboyantly inconsistent with the text and the original meaning of the Fourteenth Amendment, the Supreme Court, in the *Slaughter-House Cases* in 1873, eviscerated the privileges or immunities clause. By a 5-4 majority, the Court held implausibly that the clause was limited to a narrow group of rights already protected by the federal government, such as the right to petition

Congress and to navigate the high seas. Justice Samuel Miller, writing for the majority, rejected Bingham's view that the clause would reasonably have been understood to include a broader group of rights, including the constitutional rights enumerated in the Bill of Rights, and the common law rights enumerated in the Civil Rights Act of 1866, such as the right to make and enforce contracts and to sue and be sued. Since Justice Miller's opinion is impossible to reconcile with Justice Scalia's methodology, it is surprising that Scalia fails to criticize it. Instead, it is left to Tribe to express the consensus opinion of liberal and conservative scholars today: "I believe that the *Slaughter-House Cases* ... incorrectly gutted the Privileges or Immunities Clause, which led courts to rely on substantive due process as a basis for safeguarding substantive rights."

Even when interpreting relatively determinate texts, such as the First Amendment, Scalia is disappointingly superficial. In his lecture, he claims, plausibly enough, that the word "speech" in the First Amendment ("Congress shall make no law ... abridging the freedom of speech") does not exhaust "the full range of communicative expression. Handwritten letters, for example, are neither speech nor press. Yet surely there is no doubt they cannot be censored," because "speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole." And he goes on to acknowledge that

sometimes there will be disagreement as to how that original meaning applies to new and unforeseen phenomena. How, for example, does the First Amendment guarantee of "the freedom of speech" apply to new technologies that did not exist when the guarantee was created—to sound trucks, or to government-licensed over-the-air-television? In such new fields the Court must follow the trajectory of the First Amendment, so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment.

Tribe seizes on this observation to suggest that Scalia's conception of the First Amendment "embodies not simply a faded snapshot of a bygone age, but instead a set of principles whose understanding may evolve over time, reflecting from the outset at least some of the aspirations of the former colonists about what sorts of rights they and their posterity would come to enjoy against their own government." It is, as they say in fencing, a hit. But Scalia, in his reply to Tribe, declines the honor of styling himself what he calls an "aspirationist." He insists

that the "freedom of speech" that was not to be abridged should be viewed as a still photo of the common law of free speech in 1791, limited to the "then extant speech rights of Englishmen" during the colonial period.

Scalia's view that the First Amendment would reasonably have been understood in its own time to freeze in amber the common law rights of Englishmen is bewildering. In 1791, the First Amendment was predominantly viewed as a guarantee of federalism rather than individual rights—as a declaration that Congress had no power to displace state laws concerning speech, rather than an attempt to constitutionalize the common law rights of Englishmen. Surely the more relevant snapshot for a self-styled originalist is 1868, the year that the Fourteenth Amendment became law, in part because its supporters wanted to apply the First Amendment against the states. And, in 1868, the Reconstruction Republicans were primarily concerned not with the common law rights of colonial Englishmen but with the natural rights of abolitionists and slaves, whom Southern states had forbidden to distribute anti-slavery pamphlets through the mails, or to teach blacks to read and write. Moreover, if "the freedom of speech" really is a natural right, derived from God, rather than a positive right derived from the Constitution, as most Americans in the eighteenth and nineteenth centuries believed, then it seems hard to defend Scalia's ahistorical attempt to narrow the First Amendment to a petrification of the common law at one particular moment in time.

In any event, Scalia's reified vision of the First Amendment is impossible to reconcile with his own jurisprudence. As Tribe notes, Scalia has voted to strike down federal and state laws prohibiting flag burning, cross burning, and animal sacrifice, none of which would have been encompassed in the common law rights of Englishmen in 1791. Scalia's response is an admission of intellectual defeat: "Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew." (Scalia recognizes *stare decisis*, or the doctrine that precedents should not be lightly overturned, as a pragmatic "exception" to his originalist philosophy.) So Scalia coyly refuses to tell us whether or not what the Court has called the "bed-rock principle" of the First Amendment—that government cannot suppress speech merely because it is offensive—can or cannot be reconciled with the original understanding of the

First Amendment. He says that in the flag burning, cross burning, and animal sacrifice cases, he was merely applying the Court's "long-standing and well-accepted principles (not out of accord with the general practices of our people, whether or not they were constitutionally required as an original matter) that are effectively irreversible."

This is unsatisfying on several levels. For a start, the principle that government cannot ban speech merely because it is offensive is very much "out of accord with the general practices of our people"; it has properly uprooted a daunting variety of practices that the citizens in 1791 would have found constitutionally unobjectionable, ranging from mandatory flag salutes to cross burning. Moreover, it is not at all clear why the Supreme Court decisions holding that government cannot ban speech because it is offensive are any more "effectively irreversible" than the Supreme Court decisions holding that states cannot ban abortion in the first trimester.

Defending himself against the charge that he imports his own values into the law by his essentially arbitrary decisions about when to abide by mistaken constitutional doctrines and when to overrule them, Scalia says: "I cannot deny that *stare decisis* affords some opportunity for arbitrariness—though I attempt to constrain my own use of the doctrine by consistent rules." He then invokes his own dissent in the abortion case, in which he said that judges should uphold erroneous constitutional precedents only when they have become so deeply embedded in the fabric of the law that citizens have come to rely on them. But it is hardly clear that citizens have come to rely on the principle that government should not ban offensive speech more than they have come to rely on the principle that first trimester abortions cannot be regulated.

So Scalia's position is a mess.

V.

Finally throwing up his hands in defeat, Scalia tries to change the subject. "Where originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones." His "fidelity to the methodology should be judged," Scalia says, "not by the First Amendment cases," but instead by recent cases "discovering a novel constitutional right against statewide laws denying special protection to homosexuals ... a novel constitutional right against being excluded from government contracts because of party affiliation, [and] a novel constitutional pro-

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hibition of single-sex state schools."

In each of these cases, however, Scalia ignores his purported methodology, rather than demonstrating his fidelity to it. His objection to the discovery of a "novel constitutional right" in all three cases is rooted not in the text of the Constitution, or in its original meaning. It is rooted instead in tradition. Since states have, in the past, disfavored homosexuals, and maintained single-sex schools, and permitted patronage in the award of government contracts, they should continue to be able to do so today. In the end, Scalia exalts tradition over textualism and originalism. And in doing so, he reveals himself to be precisely the kind of common law constitutionalist that he detests.

Let us consider each of the three cases in turn. In *Romer v. Evans*, the gay rights case, Scalia accused his colleagues of employing "a constitutional theory heretofore unknown to frustrate Colorado's reasonable effort to preserve traditional American moral values." But Justice Anthony Kennedy's constitutional theory, though it was expressed a little obscurely, was hardly radical: even assuming that states could preserve "traditional American moral values" by banning sodomy, Kennedy's opinion suggested, it was not rational for a state to pass an anti-gay rights amendment which "makes a general announcement that gays and lesbians shall not have any particular protections from the law."

For all his fulminating about tradition, Scalia failed in this instance to examine the text or the original meaning of the constitutional guarantee of equal protection of the laws. For, if the Colorado amendment is read broadly, there is a plausible argument that it violates the central meaning of the equal protection clause, as originally understood. In 1868, when the Fourteenth Amendment was ratified, the central meaning of the equal protection clause was to guarantee equal administration of protective laws—that is, laws that protected citizens in their rights of life, liberty, and property. Slaves were denied legal protection in a host of ways. If they were violently attacked, they couldn't claim the protection of the laws prohibiting assault and murder; no slave could appear as a party before a judicial tribunal; and so on. The equal protection clause guaranteed that there could not be different punishments for crimes committed against whites and blacks and that criminal laws could not be enforced to protect white citizens but not black citizens.

It is at least arguable that the Colorado anti-gay rights amendments permit-

ted Colorado to protect heterosexuals but not heterosexuals in the same way that the Black Codes permitted the Southern states to protect whites but not blacks. The amendment prohibited Colorado from adopting or enforcing any statute or policy "whereby homosexual, lesbian or bisexual orientation" shall be the basis of any "claim of discrimination." It would have forbidden Denver from enforcing its police department regulations declaring that officers must "be of service to anyone ... in danger, ... regardless of race, ... gender, age or sexual orientation." Of course, a refusal by a local police department to provide gays and lesbians with police protection in response to 911 calls would have been a core violation of the historical meaning of equal protection; but the Colorado amendment would have prohibited gays and lesbians (but not blacks, or women, or old people) from challenging the discriminatory enforcement policy under local law. Moreover, forbidding the Denver police department from explicitly requiring its officers to respond to 911 calls from the victims of anti-gay violence is hardly a rational way of discouraging sodomy or, as Scalia puts it, "preserving traditional moral values." The "sheer breadth" of the amendment, as Kennedy concluded, "raises the inevitable inference that it is born of animosity toward the class that it affects."

"If it is rational to criminalize [homosexual] conduct," Scalia wrote in his dissent, "surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct." This attempt to blur the crucial distinction between status and conduct is the most disturbing passage in Scalia's dissent. Surely there is no "tradition" in American history of singling out a class of people for second-class status, and prohibiting them from filing any "claim of discrimination" based on their status rather than their conduct. Scalia cites the Court's approval of laws banning polygamy; but even assuming that it is permissible to ban polygamy, it would hardly be permissible to pass a law stating that all Mormons, because they have an inclination or a tendency to commit polygamy, can be reduced to outlaw status and denied access to the protections of state criminal law.

Romer is a difficult case, because the Colorado amendment was so poorly drafted that it is hard to know what precisely to make of it. The most convincing argument in Scalia's dissent is that the

Court ordinarily waits to be presented with a specific unconstitutional application of a dubious law, rather than striking it down across the board. Yet Scalia's strident tone, and his failure to examine the text or the history of the equal protection clause, raises the suspicion that Scalia's real allegiance is simply to preserving "traditional American moral values" at all costs, by which he means allowing democratic majorities to express disapproval of homosexuals (rather than homosexual conduct) in any way they please.

Consider the second case by which Scalia asks us to judge his fidelity to textualism and originalism. In *Rutan v. Republican Party of Illinois*, decided in 1990, Scalia vigorously dissented from the Court's conclusion that the First Amendment protected public employees from being hired, promoted, or transferred based on their party affiliation. Scalia's dissent, again, is based not on the text or the history of the First Amendment, but on tradition. "When a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down," he declared. "Something must be wrong here, and I suggest it is the Court."

As an exercise in untranslated originalism, Scalia must be right that patronage hiring doesn't violate the First Amendment. But it is certainly arguable that government jobs, which would not have been a privilege or immunity of citizenship in 1868, should be considered a privilege or immunity of citizenship in the world after the New Deal. Indeed, Scalia has more or less committed himself to that position by his opinion in the *Adarand* affirmative action case in 1995, in which he suggested that government could not use racial preferences to assign government contracts. If government jobs are not a civil right, or a privilege or immunity of citizenship, then Scalia's position against affirmative action is impossible to reconcile with the original understanding of the Fourteenth Amendment, which was originally understood to prohibit racial classifications only with respect to civil rights, or privileges and immunities. And if government jobs are a civil right, then Scalia is wrong to conclude in *Rutan* that government can discriminate against public employees on the basis of their political affiliations. (Civil rights, in the nineteenth-century sense of the world, had to be extended to all citizens on equal terms.) Something must be wrong

with Scalia's position in *Adarand* or *Rutan*, and I suggest it is Scalia.

Extreme deference to the traditional practices of democratic majorities is a plausible vision of the judicial role, assuming that Scalia were consistently deferential to democratic majorities, which he is not, as his repeated attempts to strike down affirmative action show. But traditionalism is hardly the same thing as originalism or textualism, the two methodologies to which Scalia owes his glory. There was, after all, a long-standing tradition of segregated schools in 1954; but Scalia insists that *Brown v. Board of Education* was correct to uproot this tradition. "I argue for the role of tradition in giving content only to ambiguous constitutional text; no tradition can supersede the Constitution," he wrote in *Rutan*, adding that the text of the equal protection clause unambiguously forbids segregation. How he reaches this particular conclusion is unclear, since the most natural reading of the words "protection of the laws" seems to refer to protective laws, to laws that protect citizens in their life, liberty, and property. It's quite a stretch to claim that schools unambiguously fall into this category. In any event, *Brown* shows that, for a textualist, or an originalist, the fact that a tradition has been around for a long time is not necessarily a good reason for upholding it.

Finally, consider the third case by which Scalia asks us to judge his originalism and his textualism. Last year, in *U.S. v. Virginia*, he was the lone dissenter from his colleagues' decision to order the Virginia Military Institute to admit women. His dissent, once again, focused emphatically on tradition. He criticized Justice Ruth Bader Ginsburg for "count[ing] for nothing the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government"; and he reaffirmed his view that long-standing traditions should be preserved when they are not "expressly prohibited" by the text of the Bill of Rights.

Scalia does not explain why he believes that the text of the Constitution "expressly prohibit[s]" the tradition of racial segregation in public schools and does not "expressly prohibit" the tradition of gender segregation in public schools. The text of the Fourteenth Amendment, after all, guarantees equal protection of the laws to "all persons," not to African Americans alone. There is, of course, an argument for striking down racial segregation in schools while upholding gender segregation in schools, but it has to do not with consti-

tutional text, or with long-standing traditions; it focuses on the elusive concepts of legislative purpose and social meaning. The real purpose and social meaning of racial segregation in public schools, Scalia might argue, was to sustain the racist premise that blacks are too inferior and degraded to be educated with whites; while the real purpose and social meaning of gender segregation in public military academies was to preserve the unique benefits of adversative military training for men.

There is room for debate about the actual purpose and objective meaning of gender segregation. Justice Ginsburg concluded that V.M.I. was motivated by "overbroad generalizations about the different talents, capacities, or preferences of males and females." V.M.I. countered that it cared nothing at all about the talents of women and was motivated instead by a sincere desire to preserve the benefits of a nineteenth-century English boarding school for men. But this is a debate that Scalia conspicuously fails to engage.

Originalist arguments help Scalia little more than textualist ones. It is clear from congressional debates in 1866 that the Fourteenth Amendment was originally understood to permit gender segregation in public schools; but it is hard to make the case that it was originally understood to prohibit racial segregation in public schools. Michael McConnell, who has attempted to construct a sophisticated originalist defense of *Brown v. Board of Education*, has argued that the Framers and the ratifiers of the Fourteenth Amendment did not intend to prohibit all racial classifications, but only those pertaining to civil rights, or privileges and immunities of citizenship. While the right to attend public school may not have been considered a civil right in 1866, McConnell argues, it could be plausibly considered a civil right in 1875; and so by 1954, McConnell concludes, white and black citizens had the right to attend the same public schools.

But if the right to attend public schools is considered a civil right today, this means that all citizens have to be given the right to attend the same schools on equal terms—and so gender segregation is just as impermissible as racial segregation. The privileges or immunities clause makes no distinction between women and blacks. If McConnell is right, then Ginsburg has the better originalist argument than Scalia. If McConnell is wrong, then so too, for an originalist, is *Brown v. Board of Education*. Either way, Scalia is left to squirm.

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VI.

Scalia's real allegiance, in the end, is simply, and a little coarsely, to unapologetic traditionalism. He strives in his jurisprudence to conserve traditional moral values against legal and cultural change. He is exercised not by the methodology of recent Supreme Court decisions, but by the results. His objection to the cases striking down graduation prayer, and single-sex military academies, and the Colorado anti-gay rights initiative, is that they unsettle long-standing traditions that he, as a proud social conservative, wants to keep.

Scalia, in sum, is guilty of the kind of common law constitutionalism to the repudiation of which he owes his reputation. He, too, searches for what he considers the "most desirable" result case after case, and he is not consistently restrained by text or original understanding. An uncharitable critic would suspect that Scalia defers to legislatures when they reach socially conservative results that he finds philosophically congenial, and animadverts against legislative judgments (about affirmative action and voting rights, for example) that he dislikes. And a charitable critic would be hard-pressed to detect in his embrace of traditionalism any attention to the textual or historical arguments that he says are necessary to "a government of laws, not of men." It is impossible to deny, in any event, that Scalia has an uncanny ability to reach the result that happens to coincide with his own preferences in case after case. He is never tested. He is never surprised. He is a perfect stranger to doubt. His facts and his values always add up.

Some of the most interesting advances in originalist theory during the past decade have been made by Lawrence Lessig of the University of Chicago, a former Scalia clerk. Lessig argues that the challenge for judges who wish to maintain fidelity with the original meaning of the Constitution is to find readings of the text in a new context that preserve the original meaning of the text in its own context. Sometimes, Lessig argues, changes in facts or in the climate of values require judges to engage in a process of translation in order to preserve the original meaning of the Constitution over time. Scalia himself acknowledges the occasional necessity of translation. There are cases, indeed, in which a refusal to translate the usages of the past into the usages of the present would be simply delusional. There was no television when the First Amendment protected the press, but Scalia concedes that a changed reading of the First Amendment that includes television could be a

faithful reading.

But that is an easy example. Scalia fails to consider the harder examples, the more complicated changes in facts and values that may require more complicated exercises in translation. When the Fourteenth Amendment was ratified, for instance, many of its Framers and its ratifiers understood it to forbid what they called "class legislation," which they defined as laws that took property or rights away from A for the purpose of giving the same property or rights to B. Since the labor market, according to the widely accepted laissez-faire values of the time, was presumed to allow free bargaining between capital and labor, each of which enjoyed equal bargaining power, class legislation that tried to redistribute economic power was seen as a form of special preference for private economic interests, rather than a public-oriented law that benefited all citizens equally.

By the late 1920s, however, the economic reality of the Depression had dislodged the old assumptions about the equal bargaining power of labor and capital; and progressives in the *Blaisdell* case were able to present a barrage of economic facts to argue that a Minnesota debtor relief statute was not a form of class legislation benefiting debtors and burdening creditors, but was instead, as the Court held, "a reasonable means to safeguard the economic structure upon which the good of all depends." To maintain fidelity with the original meaning of the Fourteenth Amendment, which defined "class legislation" as economic regulations that served private rather than public interests, a judge in 1997 might have to uphold minimum wage laws, even if a judge in 1868 might have had to strike them down.

So Scalia's originalism and textualism are too simplistic to be convincing. What about the alternatives offered by his critics? Dworkin persists in claiming that he is a faithful textualist and originalist, all the while viewing text and history from such Olympian heights that they appear only as an indistinct blur in his lofty gaze. He insists that he is the true originalist because he is committed, he says, to the project of "clarifying translations" (his italics) that can project the values of the ratifiers into our own time. Dworkin has not previously displayed an interest in, or a familiarity with, the enterprise of "clarifying translations." Not long ago, indeed, he was taken to task in these pages for ignoring the work of the most recent generation of constitutional scholars who are committed to working out the difficulties of translation theory.

It is a pleasant surprise, therefore, to find, in Dworkin's response to Scalia, sentences such as this: "It is a matter of complex and subtle philosophical argument what such [clarifying] translations consist in, and how they are possible—how, for example, we weave assumptions about what the speaker believes and wants, and about what it would be rational for him to believe and want, into decisions about what he meant to say." (The accompanying footnote reads, in full: "Reference to work of Quine, Grice, and Davidson." Well, obviously.) But Dworkin continues to pay only cursory attention to the text and the original context of the clauses that he purports to be translating; and the connection between his own "moral reading" of the Constitution and the words of the Constitution itself remains opaque.

To take only one example of his rush for abstraction: Dworkin criticizes Scalia for noting that when the Fourteenth Amendment was adopted it did not guarantee equal access to the ballot, but permitted distinctions in voting rights, not only on the basis of age, but also of property and sex. "Why is he so sure that the Equal Protection Clause did not always forbid discrimination on grounds of age, property, or sex (or, for that matter, sexual orientation)?" asks Dworkin.

If we look at the text they wrote, we see no distinction between racial discrimination and any other form of discrimination: the language is perfectly general, abstract, and principled. Scalia now reads into that language limitations that the language not only does not suggest but cannot bear, and he tries to justify this mistranslation by attributing understandings and expectations to statesmen that they may well have had, but that left no mark on the text they wrote.

Really? Let's "look at the text they wrote" a little more carefully. If we move from Section 1 of the Fourteenth Amendment to Section 2—and Dworkin claims that the Constitution should be read as a whole, rather than as isolated collections of unrelated clauses—we find that "the text they wrote" is not so principled or so abstract after all, and that the stark compromises embodied by the Fourteenth Amendment did indeed "leave [a] mark" on the nineteenth-century text. Section 2 says that "when the right to vote at any election ... is denied to any of the male inhabitants of such State ... or in any way abridged ... the basis of representation [in Congress] shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years

of age in such State." Many Republicans considered Section 2 the most important part of the Fourteenth Amendment, because they knew it would prevent Southern states from packing Congress with white Democrats by disenfranchising black freemen. Section 2 was passionately opposed by advocates of black suffrage, who saw it as a tacit concession that the Fourteenth Amendment did not prevent states from discriminating in voting rights on the basis of race, and by advocates of women's suffrage, who saw the introduction of the word "male" into the Constitution as a term of "caste" that allowed states to continue to discriminate in voting rights on the basis of sex.

Of course, Section 2 of the Fourteenth Amendment is textual confirmation of the original meaning of the Fourteenth Amendment, widely accepted by its drafters and ratifiers, who believed that the principle enshrined in the amendment was a prohibition on discrimination in civil rights, but not political rights, on the basis of race, sex, property and so forth. So, from the perspective of semantic originalism, Scalia is right, and Dworkin is wrong, to claim that the text of the Fourteenth Amendment prohibits discrimination in voting rights on the basis of age, sex or even, for that matter, race.

It is true that a small minority of the Republican supporters of the Fourteenth Amendment viewed the compromise embodied by Section 2 as a betrayal of the principles embodied in Section 1; but as Tribe observes in another context, "when deliberate compromises appear to underlie a constitutional gap or seeming inconsistency ... then fidelity to the entirety of the text and structure of course compels us to construe the document in a manner that honors those compromises rather than seeks to 'correct' the perceived flaws." A conscientious translator might try to argue that when the Fourteenth Amendment is read in conjunction with subsequent amendments forbidding discrimination in suffrage on the basis of race, sex, poll taxes or age (for 18-year-olds, at least), all distinctions in suffrage should be considered constitutionally suspicious today in a way that they weren't in 1868. But this would require parsing the words and studying the history of actual constitutional amendments more carefully than Dworkin is willing to do.

Tribe's response to Scalia is more effective than Dworkin's response. Tribe is appropriately hesitant where Dworkin is overconfident, and he reads closely where Dworkin skims impatiently. Tribe claims that he, not Scalia, is the true textualist: "Like Justice Scalia, I

never cease to be amazed by the arguments of judges, lawyers, or others who proceed as though legal texts were little more than interesting documentary evidence of what some lawgiver had in mind," Tribe writes, and he goes on to criticize Scalia for ignoring the constitutional text in important cases. The Eleventh Amendment, for example, directs that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or proceeded against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Despite clear textual evidence that the Eleventh Amendment was originally understood as a limit on the jurisdiction of federal courts in a narrow range of cases, Tribe notes that "a closely divided Supreme Court in *Seminole Tribe v. Florida* ... particularly with Justice Scalia joining the majority, quite remarkably treated the Eleventh Amendment as embodying an independent substantive limit on congressional power."

Now, Tribe's own jurisprudence is hardly a model of principled textualism. In his response to Scalia, Tribe emphasizes his own doubts about the doctrine of substantive due process, and he suggests that "other provisions in the Con-

stitution—particularly the Privileges or Immunities Clause of the Fourteenth Amendment—might be better sources for protecting the substantive liberties of individuals." But there is little evidence of Tribe's doubts in his recent brief and argument before the Supreme Court in the right to die case, where he insisted unconvincingly that the doctrine of "substantive due process" should be expanded to protect the right of individuals to choose the time and place of their own death. (Neither Tribe's brief nor his argument offered plausible textual or historical arguments for this unlikely proposition; he relied primarily on the very precedents that he criticized in his exchange with Scalia.) Perhaps Tribe would have us excuse him for the positions that he takes as an advocate rather than a scholar; but then we would have to excuse Scalia for the positions he takes as a justice rather than a lecturer.

Even a literal-minded attention to the constitutional text, then, points in less predictable directions than Scalia and his critics would have us believe. If Scalia, Dworkin, and Tribe were seriously committed to resurrecting the original meaning of the Fourteenth Amendment, which, as its text suggests, was understood to guarantee limited absolute equality with regard to civil rights, but

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not political or social rights, each of them might have to embrace constitutional positions that clashed with their political views. Scalia might have to uphold voting districts constructed on the basis of race, since the Fourteenth Amendment says nothing at all about political rights; and he might have to strike down single-sex military academies, assuming he believes that *Brown v. Board of Education* was correctly decided, and that public education is a civil right. Scalia might have to strike down the Colorado anti-gay rights initiative, which could be construed as a core violation of the historical meaning of protection of the laws; and he might have to uphold racial set asides for federal highway contractors, unless he believes that government jobs are a privilege or immunity of citizenship, in which case he would have to abandon his view that people can be fired from government jobs, or denied promotions, on the basis of their political affiliations. And Dworkin and Tribe would have to abandon

their cherished position that the due process clause of the Constitution protects a right to abortion or a right to die.

It is fashionable right now to dismiss Scalia as a bitter and marginalized figure, isolated from the mainstream of constitutional discourse. This does the justice an injustice. As this little book makes clear, Scalia deserves respect for having redefined the mainstream of constitutional discourse, and in a substantially useful way. But having abandoned the pose of judicial neutrality, Scalia has now transformed himself into a passionate advocate for traditional values rather than a dispassionate guardian of the constitutional text. It is no wonder that *National Review* recently nominated Scalia for president. For Scalia's labors are now unabashedly political. And the difficulty of sifting through the words and the meanings of the Constitution is now the work of more tentative scholars, whose tentativeness is a part of what qualifies them for the task. •

God's, but we do not say that God has an "opinion." Opinions are for mortals, and their value must be weighed against contrary opinion. Jesus, as the fusion of God and mortal man, also speaks with an authority above the level of opinion. And Shakyamuni, though he may have once had mere opinions before his enlightenment, speaks with absolute knowledge once he becomes the Buddha, the "Enlightened One." In the Confucian tradition, by contrast, the voice of highest authority never reaches that level of downwardly mobile divinity or upwardly mobile Buddha. But he tries harder:

The Master said: "For my part, I am not endowed with innate knowledge. I am simply a man who loves the past and who is diligent in investigating it."

Chinese commentators observe here that the Master is being modest. It is their view that Confucius is a Sage and was indeed born with innate knowledge. What we learn from their disagreement with Confucius's explicit statement about himself is not the impossible question of whether Confucius was or was not born with innate knowledge; we learn, rather, that a Sage can be "modest," and that therefore we have to discount some of his utterances as expressions of his modesty. Elsewhere commentators frame Confucius's words with claims that the Master is speaking out of anger, or despair, or pointedly shaping his words for some particularly obtuse disciple. Confucius's sayings are never contradictory in the strong sense of the term, because the Master speaks from different moods, situations, and phases of life. Jesus in the Gospels sometimes comes close to such circumstantial responses of mortal men, but he is firmly anchored in a different plane of being, to which he knows he will eventually return. Confucius, by contrast, has both his feet in this world; and, as *The Analects* reports several times, he keeps his distance from and silence about the world of gods and spirits.

This stance of Confucius in *The Analects* offers a particular challenge to translators. English has a ready-made language of divine authority; it is easy to believe that the same God speaks in English versions of the Koran as in the Bible because divinity speaks with the same English idiom in Arabia as in Israel. But the voice of authority that speaks secular truths shadowed by mortal circumstance gives us . . . Polonius. Unlike God, a Sage is always in danger of sounding pompous. It must be said that previous translators of *The Analects* have not always escaped this danger.

In a famous essay on translation, the

Master and Man

BY STEPHEN OWEN

The Analects of Confucius Translation and Notes by Simon Leys

(W.W. Norton, 224 pp., \$23)

The Analects of Confucius Translation, Introduction and Notes by Chichung Huang

(Oxford University Press, 212 pp., \$10.95 paper)

Confucianism has often been pressed into the service of cultural and national unity in China, but it has never been itself unified throughout its more than two millennia. It has been used by the state and by those who opposed the state; it has supported the claims of the community over those of the individual, just as it has supported the claims of the individual against the community. Although Confucianism is not quite a religion in the modern sense of the term, it has shown the elasticity of the world's great religions, justifying oppressors and giving comfort to the oppressed. Several times it was thought to be dead or dying, and on each of those occasions it has been reborn with renewed vitality, most recently in the past few decades.

Through all its variations and its transformations, Confucianism's sole unity has been its scriptural basis in a body of

"classics," works ranging in date from murky antiquity to the fifth century B.C. *The Analects* is only one work in this body of "classics," and it is far from being the oldest. *The Analects* differs from other works in the canon, however, in representing the voice of Confucius. Here he offers terse comments and judgments that have remained, even to today, a living part of Chinese culture, and a standard by which to evaluate the situations of everyday life.

We can never know with historical certainty whether the words recorded in *The Analects* are actually those of Confucius himself, or the imaginative reconstruction of what Confucius should have said; but in either case the Confucius of *The Analects* comes across as a powerful personality. God, as represented in the Bible and the Koran, does not have a "personality." God has judgments that are absolutely valid precisely because they are

nineteenth-century philosopher Schleiermacher made a distinction between the tendencies of translation that still remains valid. Faced with the different resources and habits of two languages, the translator may either twist the language of the translation to resemble the language of the original, or he may recast the forms of the original to come out naturally in the language of the translation. The translation committees that made the King James Bible are perhaps the most successful examples of the former approach. In the Old Testament, their English followed the Hebrew idiom as closely as possible, though centuries of devotional reading have transformed this strange Hebraicized English into one of the most familiar and fully naturalized forms of the language. English has similarly been enriched by trying to sound like Latin, French, and German. In the same way, the terseness of the Chinese idiom enriched the poetic language of the Imagist poets early in this century. To make classical Chinese effective discursively rather than poetically, however, requires a goodly amount of filling in the empty spaces.

We now have two new translations of *The Analects* to add to the roughly half dozen other translations available in print. The one is by Chichung Huang, formerly a professor at Bennington College and, before that, at Beijing University. The other is by Simon Leys, professor emeritus at Sydney University and a well-known commentator on modern Chinese culture. These two translations of *The Analects* diverge neatly into alternative approaches, both in the degree of their adherence to the Chinese idiom and in the degree of their expansion of the Chinese original.

Chichung Huang's version keeps close to the important words of the Chinese idiom, explaining problem points in copious notes following each entry. For example:

The Master said: "When three men walk together, I can surely find my teachers. I choose their merits to follow and their imperfections to correct."

A note immediately explains what no English reader would easily guess, that Confucius is one of the three men walking. The key words of the Chinese original are all present here in roughly the same order as the original.

Compare Leys:

The Master said: "Put me in the company of any two people at random—they will invariably have something to teach me. I can take their qualities as a model and their defects as a warning."

Everybody

Today is everybody's favorite day of the week.
Everybody is rubbing ice across their necks and chests.
Everybody is visiting the gravesite of the President
and leaving plastic cups filled with wine and chocolates.
Everybody is holding their breath as the song approaches its end.

And beneath the old rail bridge I run into a girl
I haven't seen in years, in a beautiful sun dress
made of colorful beads. It's a pregnancy dress, she says,
and we make love until the purple dusk on a pile of old tires
as the song birds flutter above our heads.

This is the happiest moment of my life, I say.
And she says: this is the happiest moment
of everybody's life. And she is right. And as we drift
down the river on a fallen log, others join us, drifting, singing,
and soon the dead and the sick and the poor are singing too.

And the stars begin to fall, and though everybody is waiting
for a terrible surprise, it hasn't come yet, not just yet.

MARK LEVINE

Here and elsewhere Leys has made Confucius speak English more persuasively than any translator to date. His achievement is one of simplicity, for only by the most careful simplicity can an English Confucius avoid confusion with Polonius. In many cases Leys prevents Confucius from uttering pious adages by making him seem to respond to something elided.

Consider Chichung Huang's Confucius:

The Master said: "Those who discourse sincerely are always commended. Are they real gentlemen? Or only those who assume a dignified countenance?"

This is Confucius as Polonius, or as nineteenth-century Chinese schoolmaster, and not someone with whom I would want to have dinner. Leys's Confucius, by contrast, speaks as if confiding to us his reservations about someone in particular:

The Master said: "His opinions are sound, I agree; yet is he a gentleman, or is this only a solemn pretense?"

Since classical Chinese does not easily distinguish between a general case and a particular case, both these interpretations are within the capacious reach of the original.

Leys has an exceptional sense of English phrasing, punctuation and rhythm that lends Confucius a simple dignity that less sensitive translators have not achieved.

Lord Ji Kang asked: "Which of your disciples loves learning?" Confucius replied: "There was Yan Hui who loved learning.

Alas, his life was short: he is dead, and now there is no one."

Here and elsewhere, the original Chinese has a rich array of words that mark the tone of an utterance, giving many of Confucius's statements an emphatic theatricality that does not work in English. Would we have gained anything by translating the last part of Confucius's remarks above (rendering the Chinese mood word with an exclamation point), "Unfortunately his fated span was short, and he died! As for now, there is no one." The best translator of the naturalizing school naturalizes not only the words but also the deeper habits of the language with which he is working. Leys knows that English more often represents strong feeling by reserve than by rhetorical emphasis.

Such translation is, indeed, Confucius speaking English.

The Master said: "I enlighten only the enthusiastic; I guide only the fervent. After I have lifted up one corner of a question, if the student cannot discover the other three, I do not repeat."

The Master said: "A gentleman is not a pot."

The second passage is "one corner of a question" indeed; and however fervent and enthusiastic we may be, it is hard, from the English translation alone, to supply the missing corners. It is a declaration so patently true that to record it is hardly less surprising than to affirm the alternative (that a gentleman is, indeed, a pot). This "non-potliness" of the gentleman in many ways embodies both the problem of *The Analects* and its trans-

lation. The reader, arrested and perplexed, may turn to the notes at the back of Leys's translation to find a full explanation, a process roughly corresponding to that of two millennia of Chinese students, who would look from the Master's terse, archaic utterances to the commentary that explained what the Master meant.

In his introduction, Leys speaks eloquently of the accretion of commentary and use, comparing this process to coats hung one on top of another on the hooks of a cloakroom rack.

For the native reader the classic is intricate and crowded, it is a place filled with people, and voices, and things and memories—vibrating with echoes. For the foreign reader, on the contrary, the classic often presents the forlorn aspect of the cloakroom after hours—an empty room with mere rows of bare hooks on a blank wall, and this extreme austerity, this stark and disconcerting simplicity account in part for the paradoxical impression of *modernity* which he is more likely to experience.

I think what Leys means here is not “modernity,” except in the formal aspect of the work’s disjunctive austerity, but rather its immediacy, its relevance to the present. Still, we may legitimately ask whether there are really hooks under those piles of coats hanging on the wall. That is, what is left when *The Analects* is emptied of its history of use and interpretation? When we get back to “a gentleman is not a pot,” we find that we have to restore something of that interpretive history to avoid a surrealist dictum whose only value is that of surprise.

In his translation of “a gentleman is not a pot,” Chichung Huang in this case gives the English reader a boost by a more general and interpretive choice of words: “A gentleman is not a utensil.” Despite the unfortunate association with tableware, this translation does convey a sense of particular functionality, though both Leys’s daring word choice, restricted to the object rather than to its figurative possibilities, and Huang’s easily figurative choice are hardly an improvement on Arthur Waley’s “a gentleman is not an implement.”

All our translators are quick to explain what Confucius was understood to have meant: that someone who possessed the moral and cultural education that Confucius advocated would be a generalist, rather than a person trained only to a particular purpose. As with many of Confucius’s cryptic and less cryptic remarks, the saying, with its history of explanation, had large consequences in Chinese civilization. It raises questions that remain valid: Do we conceive of education

as training for some particular task, or as a broad knowledge and ability to learn that promises a flexibility in performing concrete tasks?

In premodern China, the assertion that a Confucian gentleman should not be a pot led to a political organization whose officials were called upon to manage a remarkable range of specialized public duties: managing local finances, serving as judges, planning flood control projects, organizing and leading local militias. Some failed; others succeeded; and we cannot say that the gentleman who was not a pot served the imperial system less effectively than a system of specialists. The same question resurfaced in the People’s Republic of China in the 1950s, transformed into the “Red versus expert” controversy, which asked whether public projects should be managed by good communists or by specialists. To the surprise of no one who knew the Chinese tradition, it was concluded that the “not pot” communists would be the sounder choice.

Leys is the most successfully naturalizing translator of Confucius we have had, and “a gentleman is not a pot” is the exception rather than the rule for the English-speaking Confucius of Leys’s *Analects*. It reminds us, however, that when we strip away those layers of added interpretation, we often come to words that are stubborn, archaic, sometimes barely comprehensible. Leys believes that, by the gift of translation for a foreign audience, he is stripping away the accretions of history to reveal a passionate and tragic “original” Confucius. Yet, as Leys knows, every one of those Chinese interpreters and users of *The Analects* over the course of two millennia believed that he was representing the “original” Confucius. Indeed, many believed that they, too, were stripping away layers of historical accretion to get back to the original Sage.

Leys’s scholarship is good, but the real genius of his translation is not the scholar’s wrestling with those intractable words which, we discover reluctantly, sometimes embody values that we cannot share, whether we are modern Chinese readers or modern English readers. Leys sees his task as making the Confucius of *The Analects* fully persuasive again. He does this brilliantly, but he does it by deploying the translator’s power of interpretation. The compelling simplicity of his phrasing and his choice of words carries a heavy freight of interpretation. As a naturalizing translator, he wants us to feel at home with Confucius.

When he can, Leys hides the traces of the archaic. When Confucius refers to a menial post, it is that of “whip-bearer”; in

Leys’s translation this becomes a “janitor” (ingeniously justified in the notes). Far more significant is his handling of the key terms of Confucian morality. Just as the values of historical Confucianism have become suspect in China, the terms once used to translate those values have become suspect in English. To the nineteenth-century Christian translator James Legge, the Chinese term *Yi* was “righteousness.” In contemporary usage “righteousness” has ceased to be simply principled goodness and has taken on associations of an assertive public display of goodness, never far from “self-righteousness.” Legge can still use the term (here in the negative form) comfortably:

The Master said. “With coarse rice to eat, with water to drink, and my bended arm for a pillow;—I have still joy in the midst of these. Riches and honor acquired by unrighteousness are to me as a floating cloud.”

The first part of this is actually one of Legge’s finer moments, with its careful rhythm and inverted placement of “still” to produce an ambiguity in English (an ambiguity not present in the Chinese). The condemnation of “unrighteousness,” however, suggests a Victorian piety that now no longer rings true. Chichung Huang, who cannot be said to have a fine ear for English, follows this closely (“acquired by unrighteous means”). Other modern translators tend to follow the rule of avoiding the phrasing of predecessors, and nowhere do they practice avoidance more intently than with Legge’s terms of Victorian piety. Waley handles the second sentence by puffing it up: “Any thought of accepting wealth and rank by means that I know to be wrong is as remote from me as the clouds that float above.” And D.C. Lau tries: “Wealth and rank attained through immoral means have as much to do with me as passing clouds.”

It is for Leys to discover some ethical category that is still untainted by associations of Victorian piety; and he succeeds wonderfully:

The Master said: “Even though you have only coarse grain for food, water for drink, and your bent arm for a pillow, you may still be happy. Riches and honors without justice are to me as fleeting clouds.”

The choice of the word “justice” salvages the passage for the modern English reader. The problem is that the line now suggests something very different from the means by which an individual might become rich and honored. (All translators avoid the archaic implications of *gui*, which is less a general “honor” than a promotion in social status.) Unfortunately, the assertive public virtue implicit in “righteousness” may be the

historically most accurate translation for the *Yi* of Confucius, who confidently and frequently criticizes others for their moral failings and infractions of ritual propriety. Perhaps Confucius was a passionate, heroic, tragic figure and a bit of a prig.

These comments are not meant as a criticism of Leys, but as a reminder of the consequences of translation; and those consequences are magnified in direct proportion to the success of the translation. The more beguiling this liberal Confucius is in calling for our assent, the more stubbornly we should look again. He is, we discover, actually tolerant of changes in ritual form. What matters, for him, is the feeling that informs the ritual:

The Master said: "According to ritual, the ceremonial hat should be made of hemp; nowadays it is made of silk, which is more convenient; I follow the general usage. According to ritual, one should bow at the bottom of the steps; nowadays people bow at the top of the steps, which is rude. Even though it goes against the general usage, I bow at the bottom of the steps."

Here Confucius cites two examples of ritual prescriptions, one of which it is permissible to vary with changing fashion and one of which is improper to change. Confucius, who is never hesitant to condemn frills in attire, is here confident in his judgment that the silk ceremonial cap is a mere change of convenience, while bowing "at the top of the steps" (properly, having advanced all the way into the ceremonial hall) is a significant rudeness. Leys gives the standard and obviously correct comment in his notes, that the one is a merely superficial form of ritual, while the other is a significant sign of the attitude of respect in the person taking part in the ceremony.

Yet we could easily reverse the positions of the cap and the bowing and end up with exactly the same interpretation. In this hypothetical case, we would observe that, wherever one bows, one is demonstrating the proper respect, so that the change in custom is a matter of indifference. The fabric of the cap, by contrast, demonstrates the humility of the celebrant; and the recent choice of silken fabric marks a showiness and lack of the proper attitude with which to approach the rite.

Leys's English-speaking Confucius is almost always fluent, and in many cases he addresses the present in a powerful way. Still, throughout *The Analects* there is also an archaic Confucius, a figure who compels us not because he addresses our present world but because he

gives us an immediate insight into a world that is strange to us. What is the lesson of the passage above? That a terribly important distinction is to be made, and that Confucius can make that distinction. We can only guess at his criteria for judgment. And *The Analects* is telling us what we should do, how we should behave, the qualities that we should nurture. *The Analects* belongs not to Confucius, but to the disciples, and to all who would be disciples.

As Leys beautifully observes, Confucius speaks with the urgency of one who feels that an ancient civilization is collapsing before his eyes. To prevent that collapse, Confucius invokes values and principles that have mattered for millennia and can still matter. But no less important to him is how one dresses in ritual and where one bows. Confucius knew the answers. But *The Analects* belongs to the disciples; and if the hope of civilization rested on what Confucius knew, *The Analects* breathes a fear of error, shortcoming and folly. The disciples know that they might easily put on a

hemp ceremonial cap and bow at the top of the stairs; they might, on their own, make the wrong judgment. *The Analects* is strewn with comments on the failures of others—of the ancients, of Confucius's contemporaries, of particular disciples. The possibility of error is everywhere, and each error is a loss that puts us further from past perfection.

This is the dark poetry of Confucius, *The Analects* not as an eternally relevant book of moral philosophy, but as an evocation of a world of continuous slippage in the shadow of dangerous failure. Recovering from sickness, the disciple Zengzi summoned his own disciples and cited from the Classic of Poetry, an older Confucian "Classic":

Trembling and shaking,
As if on the edge of an abyss,
As if treading on thin ice.

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Meet the Platters

By DAVID A. BELL

The Beggar and the Professor: A Sixteenth-Century Family Saga by Emmanuel Le Roy Ladurie

(University of Chicago, 407 pp., \$29.95)

It was William Blake who wrote of seeing "a world in a grain of sand," but it is modern historians who have made the idea the basis of a scholarly genre, now called "micro-history." Instead of trying to encompass whole countries or centuries in their gaze, micro-historians prefer to take a single locality, life or event—preferably one ignored or unappreciated by conventional historians—and place it under a microscope, hoping to see reflected off its tiny facets the images of large historical forces at play.

Micro-history was born partly out of frustration. When contemporary historiography's great turn to social history took place in the middle of this century, some of its more ambitious proponents—notably Fernand Braudel of the *Annales* school—set as their goal nothing less than a "total history" that would draw on the whole panoply of the social sciences, as well as on traditional investigations into politics and culture, to pro-

duce a more complete picture of the past than any ever previously attempted. Braudel himself aimed for something of the sort in his masterpiece, *The Mediterranean and the Mediterranean World in the Age of Philip II*. He started with slow-acting geological forces, then proceeded through analyses of climate and demography to long-term economic cycles, and finally to politics and diplomacy.

But Braudel's students, in part because they realized how much even Braudel himself had left out, mostly decided that they could only hope to capture something like totality on a smaller scale: a single French province, a single city or town. Even then, however, the goal proved frustratingly elusive. With each batch of dissertations the scale of investigation seemed to shrink a little more. Some adepts of total history eventually found themselves trying to capture totality in the smallest possible space. (With mixed results: not everything small is a microcosm. Some small

things are just plain small.)

Total history may have been a mirage, in large or small; but taking up the microscope in its pursuit allowed historians to tap resources in themselves that earlier forms of social history had largely suppressed in its practitioners, and the results, if not total, were fruitful nonetheless. By its very focus on individuals and groups, micro-history forced scholars to take individuals seriously as historical agents, which Braudel, like the Marxists, rarely did. It forced them to re-examine the cultural forces that shaped individual mentalities, leading them into a useful partnership with cultural anthropology, and eventually helping to launch the recent wave of cultural studies that have, at their best, done much to reinvigorate the discipline.

It also forced them to use their powers of imagination and their narrative skills to make sense of events, and even to fill in gaps in the archival records. Thus, in place of the statistic-laden social-scientific prose of many of their predecessors, they tended to write stories—dramatic, powerfully told stories—and just as frequently they drew criticism for overstepping the boundary between fact and fiction. Indeed, the stories were often more alluring than all but the best fiction, for some grains of sand in the

archives turned out to be tiny gemstones. Most famously, there was the story (rediscovered and retold by Natalie Zemon Davis) of Martin Guerre, a sixteenth-century French peasant who went off to war and disappeared, to be replaced in his wife's bed and his neighbors' affections by a convincing and charismatic imposter.

No historian's career better exemplifies the shift to micro-history than Emmanuel Le Roy Ladurie's. He was Braudel's most brilliant student, and his doctoral thesis on the early modern province of Languedoc became one of the classic works of the *Annales* school. He has occasionally attempted other projects on a grand scale, such as a history of climate over the past millennium, but for most of his career he has gravitated irresistibly to the miniature. In 1975, he published an especially glorious work of micro-history called *Montaillou: The Promised Land of Error*. Taking advantage of the fact that, in the early fourteenth century, the Inquisition had exhaustively interrogated virtually the entire population of the mountainous southern French village of Montaillou on suspicion of heresy, he plumbed its records for information on everything from the villagers' shepherding practices to their (frequent) illicit sexual liaisons and their (infrequent) bathing, to their social relations and religious beliefs, and he wove it all into a beguiling and stunningly vivid tapestry of late medieval life. The book confirmed Le Roy Ladurie's reputation as one of the leading historians of his generation.

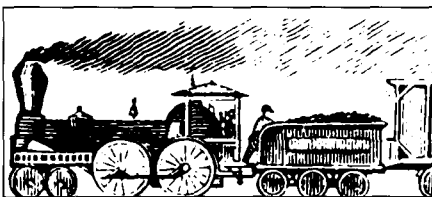
At first sight, *The Beggar and the Professor*, the first part of a projected two-volume study, reads more like biography than micro-history, but it follows directly from Le Roy Ladurie's earlier work. His subjects, a sixteenth-century Swiss printer and teacher named Thomas Platter and his doctor sons Felix and Thomas, left little direct imprint on the course of European history, though the elder Thomas Platter did publish the works of John Calvin. These figures remain of interest (and are well known to specialists) because the autobiographical essays that they left behind are historical treats of Martin Guerre quality, illuminating areas of sixteenth-century life that few other documents even mention. (*The Century of the Platters*, Le Roy Ladurie's original French title, expresses this point much better than the flat title chosen by the University of Chicago Press.) Le Roy Ladurie has also taken the imaginative and narrative side of micro-history to its logical conclusion here, suppressing his analytical historian's voice almost completely, and simply retelling the stories,

almost novelistically. This is a work of history that has relatively few footnotes but brims with description, dialogue, and declarations about what really happened.

The Beggar and the Professor might have stood, then, not only as another milestone in micro-history, but as an interesting experiment in historical storytelling, to take its place beside recent related American experiments like Simon Schama's *Dead Certainties*, James Goodman's *Stories of Scottsboro*, and John Demos's *The Unredeemed Captive*. All the more pity, therefore, that Le Roy Ladurie has fallen so short of his earlier mark. His text is lively, but it is also meandering and repetitious. He slips too easily into banality. And, unlike Schama, Goodman and Demos, he never lets the reader see behind his narrative mask to get a sense of what his source material is, and how he is using it.

Le Roy Ladurie does bring some points across with real skill, drawing on his copious knowledge of the sixteenth century (and a mastery of sixteenth-century Swiss German) to make the Platters accessible to modern readers. They were, he shows, men of vast appetites, not just for food, but for worldly success, travel, and learning; and he recounts their various gorgings in fascinating detail. He tells how Thomas Sr., as a young artisan, would sneak moments away from his workbench to study Latin, Greek and Hebrew, and at night chew on raw turnips or even on sand so as to stay awake and study more. He describes lavish meals at lavish length, even including the menu from Felix's wedding. He also dwells with palpable pleasure on the welter of languages and nationalities the Platters encountered, for their Europe was a vibrantly mobile and cosmopolitan one. Thomas Sr. begged his way across half of Germany before reaching the age of 12, while Felix studied medicine with Marranos in Montpellier, and seemed to encounter no one but Germans and Swiss in Paris. When he couldn't find a language in common with a stranger, he shifted easily into Latin. By the end of the book, Le Roy Ladurie has not only thoroughly sketched out the Platters' particular brand of gusto, he has also made it seem a defining characteristic of the sixteenth century. The argument is not particularly surprising. The age of the Platters was also the age of Rabelais.

Le Roy Ladurie also points out that no matter how sated with success, the Platters always lived at close quarters with danger. In the sixteenth century, everyone did. Brigands infested the roads, so people generally traveled in groups, and well-armed. Even more terribly, the



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bubonic plague repeatedly lashed across their communities. The Platters themselves escaped, but Thomas Sr.'s father, one of his sisters and no less than six of his daughters fell victim, as well as fully a quarter of the population of Basel—4,000 people—in the dreadful winter of 1563-64 alone. Perhaps the constant threat of death explains something about the episodes of violent, cruel humor—also reminiscent of Rabelais—that the Platters recount. In one scene, Thomas Sr. scares off beggars by showing them the body parts of a cadaver he is dissecting. Felix's friends serve him up a tasty rabbit paté that is actually made from cats. His sister teases him by rubbing rings of chicken flesh in his face, and for the rest of his life he cannot bear the sight of rings of any sort.

The historian recounts all this in a light, witty style that has become something of a trademark for him. The style doesn't translate particularly well, however, for it relies heavily on French wordplay and deliberately incongruous modern French references (the playwright Labiche, the Crédit Suisse Bank, the *grandes écoles*, and so on). Arthur Goldhammer's great abilities notwithstanding, his translation, though otherwise a model of clarity and precision, does not prevent a certain deadening of the prose. Some of Le Roy Ladurie's more striking lines do come across well, though, such as his wonderful remark that in the Renaissance, "culture spread from person to person by contagion, like the plague." The book's conclusion ably interweaves quotations from the biblical story of Abraham and Sarah with the description of how, late in life, the childless Felix Platter effectively adopted his much younger half-brother Thomas Platter Jr. and other children as well.

But readers will need extraordinary stamina to make it as far as the conclusion, and in general to pick out the glittering detail from the muddle of Le Roy Ladurie's text. The problem derives in the first instance from Le Roy Ladurie's narrative strategy. He has obviously tried to reproduce something of the chatty, rambling feel of the Platters' memoirs. Yet sustaining such a tone over nearly 400 close-packed pages while avoiding tedium and confusion requires real discipline, and Le Roy Ladurie doesn't have it. He jumps back and forth carelessly between individual life-stories, and often mentions important characters (Thomas Platter Sr.'s second wife Hester Gross, Thomas Platter Jr.) many pages before explaining who they are. The almost random introduction of extraneous material (*Hamlet*, a modern biography of King Henri II, Jules Miche-

let, *Madame Bovary*) quickly loses its charm, as do Le Roy Ladurie's bromides about the modern world: "It would be pleasant if today's workers felt driven to study Latin and Greek on the job"; "[Sapidus] favored methods that some people nowadays consider old-fashioned: his students were required to learn texts by heart and study grammar diligently." Worst of all, he constantly and carelessly repeats facts and stories: Thomas Sr. set off on a journey carrying thirteen pieces of gold (pages 41 and 45); he probably acquired an early immunity to the plague (43 and 50); he had a mentor named Oswald Geisshuessler (29, 58, 203) for whom his wife had worked as a servant (39, 150); Felix gave his wife a beautifully bound Bible from Paris (278, 326). While chiding the elder Platter for misrecording his daughter Ursula's age at death, Le Roy Ladurie, telling the story twice, himself can't decide if she was 17 or 18.

Then there is the problem of banality. The Platters were platitudinous, and their historian slides all too easily into their bad habits. One character "was a curious fellow," another "was not in great shape." Thomas Sr. "knew the value of a penny" and his career as a printer "had its ups and downs." Felix was "*Teutsch* to the very depths of his soul." We learn that some Renaissance plays, though forgotten today, were warmly received at the time (really?), and that "friendships begun while travelling are often short-lived." Reducing the marvelously complex character of Felix Platter by a dimension or two, Le Roy Ladurie asks: "Did the Renaissance come to outweigh the Reformation in Felix's life?"

In some cases, these clichés come straight out of the Platters' own memoirs, but (and this is the book's most serious problem) the reader can almost never tell. When John Demos engaged in speculative, fictional reconstructions of his characters' thoughts in *The Unredeemed Captive*, a study of a New England girl abducted by the French and Indians in the early eighteenth century, he clearly stated his intentions and carefully described his source material, allowing readers to judge the experiments for themselves. But Le Roy Ladurie slides without warning from direct quotation to paraphrase to his own invention and back again. The reader doesn't learn until deep into the early chapters how Thomas Sr. came to compose his autobiography (he dictated it at Felix's request), and only on page 79 does Le Roy Ladurie offer even the slightest evaluation of the autobiographical materials themselves ("Thomas is concrete, precise, and brief, whereas Felix often digresses to recall various details of his childhood").

The result is confusion. To take just one example, Le Roy Ladurie casually remarks that Thomas Platter Sr.'s mother "suffered too much in her own wretched life to be deeply affected by the tribulations of her children." Did Thomas himself make this charge? If so, can we trust him? Or is the historian simply speculating, based on his overall study of the memoir and his knowledge of early modern family history? He never lets on, and never asks if a lack of outward emotion on the mother's part necessarily signified a lack of caring. Perhaps he will give a more detailed discussion of sources in the second volume. Here he provides little more than a brief bibliography.

This book, then, is a missed opportunity. At a time when most historians have wholly abandoned any hint of a literary vocation, the return to narrative led by micro-historians such as Le Roy Ladurie has had a refreshing effect. But at a time when readers have developed a heightened sensitivity to the problems involved in reading and representing historical source material, an omniscient, unproblematic narrative such as *The Beggar and the Professor* can rarely amount to much more than entertainment. Ironically, historical storytelling today has proven most effective when the writers have offered their work not as transparent windows onto historical drama, but as a conscious artifice, a mental tool for reaching into areas of the past inaccessible to the instruments of cold analysis. The spotlight, one might say, needs to shine on the scaffolding as well as on the set. Le Roy Ladurie has left too much hidden from sight.

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You Will Not Taste Death Jesus and Epicureanism

Despite close Epicurean friends, Cicero called Epicureanism the most dangerous of philosophies because it undermined the virtues basic to civilization; yet it most closely approaches a modern scientific world view. Two recently discovered documents: the *Gospel of Thomas* and the *Secret Gospel of Mark* interrelate with the skeletal chronicle underlying the *Gospel of Mark* to make credible the authenticity of Thomas' 113 sayings of Jesus and give them context. In these Jesus speaks from an Epicurean, not Judaic, stand. Author: Jack Hannah, 321 pp.-pbk, \$12 postpaid. FRANK PUBLISHING, 1816 Springmill Road, Mansfield, OH 44903-8907.

CAMBRIDGE DIARIST

My Wives Club

I'M PLEDGING A SORORITY AT Harvard this term. This would be unremarkable except that I am not a student and I am not a woman. My sorority is the Partners Club, a group of students' spouses at Harvard Business School, where my wife is in her first year. "Partners" is actually a euphemism; the group was called the Wives Club for years, and it remains 98 percent female today, a measure of the school's woeful recruitment of female students. Partners Club events—afternoon teas, potluck suppers, self-defense seminars, play groups—are designed to keep us spouses busy while our husbands, er, partners, train to become masters of the universe. But the other men seem to find it awkward enough playing the trailing spouse without joining something that sounds, at first, like the Junior League.

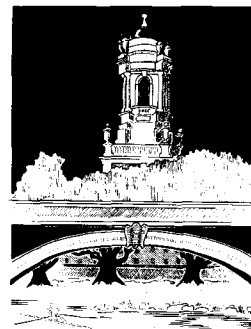
THE PARTNERS CLUB NEWSLETTER, "The Connection," keeps me up to date on all club happenings. Sadly, I missed the Ritz tea, at which, "The Connection" reported on page one, "We helped ourselves to the abundant buffet of tea sandwiches, fruit tarts, and warm scones." I'm afraid I also skipped a session this month at which Crane & Co., stationers, coached us on "the etiquette of letter writing." Another evening found the Partners Club gathered in a classroom for a simulation of a famed HBS Case Study. The case was about (what else?) a florist. "Why do we send flowers?" the professor queried. One of the women ventured: "It makes us feel nice." Another tried to improve on this: "It makes us feel loved." In the back row, a friend of mine, Bob, one of two men at the event, had heard enough. "It keeps us out of the doghouse," he blurted. Alas, the Partners Club has since had to do without such masculine insight, as Bob, who prefers the sweaty familiarity of the basketball court, hasn't returned. I suppose I can't blame him. I'm having trouble becoming one of the gals myself. Even the campus gym doesn't seem to want to recognize male partners. When I joined the gym, my membership card came back to me with my name but a photo of a young woman. The towel attendant told me it was a vast improvement.

TO COUNTER THIS THREAT TO manly dignity, I've joined with some similarly disgruntled husbands to form a Partners Club splinter group. We don't actually meet—we can't be bothered with such details—but we have a name: the Harvard University Male Partners Club. The idea came at a dinner in Boston's North End with five husbands and our business-school wives. We had slipped into our role-reversal easily, the women talking about their career plans and the men exchanging kitchen tips and lamenting our deteriorating figures. But then conversation turned to the fact that we weren't scoring any points for being sensitive—our wives considered us a nuisance. So we traded various ribald slogans for Club T-shirts and contemplated a hostile slate for the approaching Partners Club elections. The rebellious guys promised they would join me the following week for the Partners Club potluck.

THEY LIED. AT THE POTLUCK, I found myself the only member of my male partners club and, for that matter, the only member of my gender. True to my sex, I arrived an hour late and without a dish. Through the window, I could see some three dozen women, and not a single male out of diapers. I walked around the building twice to summon the courage to enter and, upon entering, could almost feel conversations die as people stared. I was a freak. "You're a partner?" inquired the first woman to whom I introduced myself. The experience reminded me of when I strolled down to the Mall, back in Washington, D.C., on my lunch break to see the Million Man March: I was welcome enough, but conspicuously out of place. At the potluck, though, I was soon sitting at a table with a dozen women, nibbling cookies and sipping Diet Coke. A woman offered babysitting services. Another asked if I'd been spending much time at the gym. "We're going to have great bodies by the time it's over," she declared. Still, this wasn't exactly a knitting club: some of the women I met held high-powered jobs that could match any male partner's. So where were all the guys? "I guess they couldn't handle being with all these women," one partner suggested. Another woman shook my hand to salute my courage in shattering the gender barrier, then added: "You must have a feminine personality."

THE PARTNERS CLUB'S MAN TROUBLE is the inevitable result of Harvard Business School's woman trouble. HBS has been admitting women since the class of 1965, but the number has never been

higher than 29 percent, and the percentage has declined over the last two years—to 24 percent for my wife's class, the class of 1998. Harvard admits women in proportion to their numbers in the applicant pool, refusing to dilute quality just to plug the gender gap. That makes sense to me. My wife wouldn't want anyone to think she's here because of softer criteria. On the other hand, the uniquely powerful Harvard MBA propels its bearers up the corporate ladder, and HBS, by working harder to recruit and admit more women, could go a long way toward leveling the corporate gender imbalance. Until it does, HBS is a scary place for its female minority.



ACTUALLY, IT'S A SCARY place for most anyone. Because grades are based on class participation, students joust for "airtime" in class while steering clear of "sharks" (the classmates who publicly cut down peers to advance themselves). The women must also contend with constant sexual innuendo and

coarse humor in class. One man I know of declared, in a role-playing session, "I'll cut your balls off," to mass applause. It may be aggravating for women, but perhaps the sexism is a good thing. These women will soon be vastly outnumbered by beastly men in the boardroom. Better to learn their boorish ways early, in the classroom.

SPEAKING OF BEASTLY MEN, MY comrades in the male partners club again let me down on Partners Club election night. Only one man received a vote, and that was my write-in of Bob for social coordinator. This time I was alone with fifty women. The campaign speeches (one promised a monthly get-together "to give you moms some time out") did not entice me. The whole thing was entirely too nice. A candidate for president even suggested calling off the vote and electing everybody—a proposal that surely wouldn't fly among the husband-sharks at HBS. Fortunately, the race for vice president held more appeal. One candidate suggested a "men's night," because, let's face it, "our events are geared more toward women." It was blatant pandering for the male vote, but successful. I cast my ballot for men's night. Later, I asked her to elaborate, and she said the husbands should meet at a bar, by themselves, and smoke cigars. Maybe we can watch a wrestling match, scratch ourselves and make rude noises, too. Male partners club members will distribute needlepoint patterns.

DANA MILBANK

Theodore Waitt

*Gateway 2000, North Sioux City, SD.
34. Married, 4 children.*

Talked out of joining family cattle business. By father. Left college senior year to start computer mail order business in farmhouse. With \$10,000 start-up loan secured by grandmother's CD.

"Everybody was heading to Silicon Valley. So I picked a cornfield."

Cofounded Gateway 2000 with partner, Mike Hammond. 1985. Direct-market PC seller and manufacturer based in South Dakota. First year revenues \$100,000. Explosive growth due to low costs, fast service. Expanded overseas, 1993. Marketing coup: chose Holstein as company mascot.

"It was either the family cow or the family dog. 'Bunky' lost."

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Started reading Forbes as a student at the University of Iowa in 1984.



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